Greyhound Lines, Inc. *and* Amalgamated Council of Greyhound Local Unions, affiliated with Amalgamated Transit Union, AFL–CIO, CLC. Cases 30–CA–10681–2 and 30–CA–10960, et al.

October 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING, COHEN, AND TRUESDALE

On September 22, 1994, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Amalgamated Council filed answering briefs, and the Respondent filed reply briefs to the answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.[3]

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

We deny the Respondent's motion to strike the attachment to the General Counsel's answering brief and the General Counsel's motion to strike references to alleged union misconduct contained in the Respondent's supporting brief.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent excepts, inter alia, to the judge's factual finding that there were four bids annually for regular runs and extra board selection and to his finding that about 15 percent of the reinstated (crossover) former strikers received Experience Based Seniority (EBS). We find merit in these exceptions as the 1987–1990 collective-bargaining agreement specifically provided for three bids annually and part IV (2) of the attachment to the General Counsel's answering brief states that 24.40 percent of the crossover drivers (184/754) had EBS credit.

In the last paragraph of sec. II,E of his decision, the judge, in finding the Respondent's defenses without merit, stated that ''[t]o the extent that the foregoing discussion deals with Respondent's stricken affirmative defenses, I am adopting and reaffirming the relevant portions of my December 30, 1991 decision and order.'' On March 12, 1992, the Board denied, without prejudice to the Respondent's right to renew its contentions in the exceptions process, the Respondent's cross-appeal of those portions of the judge's order granting the General Counsel's motion to strike certain of the Respondent's affirmative defenses. The judge's discussion of the Respondent's affirmative defenses contained in his unpublished December 1991 Decision and Order are set out in the appendix to this decision.

[3] In sec. II,B of his decision, the judge discussed the partial settlement agreement reached by the parties and recommended its approval by the Board. On February 24, 1995, the Board approved the partial settlement agreement and on June 9, 1995, the Board issued an order denying motions for reconsideration. Accordingly, at the compliance stage of this proceeding, the provisions of the judge's recommended Order, which we adopt, are to be carried out in accord with the terms of the settlement agreement reached by the parties and approved by the Board.

We note that the judge, in granting the Respondent's motion to sequester the witnesses, read a sequestration order whose language had been agreed on by the parties. While we do not fault the judge's sequestration order, we believe that the following explanation of the rule would be more appropriate:

> Counsel has invoked a rule requiring that the witnesses be sequestered. This means that all persons who are going to testify in this proceeding, with specific exceptions that I will tell you about, may only be present in the hearing room when they are giving testimony.
>
> The exceptions are alleged discriminatees, natural persons who are parties, representatives of non-natural parties, and a person who is shown by a party to be essential to the presentation of the party's cause. They may remain in the hearing room even if they are going to testify, or have testified. However, alleged discriminatees, including charging parties, may not remain in the hearing room when other witnesses on behalf of the General Counsel or the charging party are giving testimony as to events as to which the alleged discriminatees will be expected to testify.
>
> The rule also means that from this point on until the hearing is finally closed, no witness may discuss with other potential witnesses either the testimony that they have given or that they intend to give. The best way to avoid any problems is simply not to discuss the case with any other potential witness until after the hearing is completed.
>
> Under the rule as applied by the Board, with one exception, counsel for a party may not in any manner, including the showing of transcripts, inform a witness about the content of the testimony given by a preceding witness, without express permission of the Administrative Law Judge. The exception is that counsel for a party may inform counsel's own witness of the content of testimony, including the showing of transcripts, given by a witness for the opposing side in order to prepare for rebuttal of such testimony.
>
> I expect counsel to police the rule and to bring any violation of it to my attention immediately. Also, it is the obligation of counsel to inform potential witnesses who are not now present in the hearing room of their obligations under the rule.
>
> Are there any questions?
>
> [It is also recommended that as witnesses leave the witness stand upon completion of their testimony, they be reminded that they are not to discuss their testimony with any other witness until the hearing is completed.]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Greyhound Lines, Inc., Dallas, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

APPENDIX

Excerpt from Judge Giannasi's December 30, 1991 Decision and Order on Motions to Strike Affirmative Defenses, to Further Amend Complaint, and to Sever Certain Complaint Allegations

The Affirmative Defenses

Respondent's answer contains a number of affirmative defenses, the following of which are pertinent here:

> 2. If no impasse existed on March 2, 1990, when Greyhound implemented certain terms of its January 10, 1990 proposal, subsequent impasse on March 17 and/or on May 5, 1990, cures the alleged violation.
> 3. If no impasse existed on March 2, 1990, impasse was precluded, and unilateral implementation was justified, by the Council's failure to bargain in good faith and/or its reliance on a concerted campaign of violence to extract economic concessions from the Respondents and/or to drive Respondents into bankruptcy.
> 4. If no impasse existed subsequent to March 2, 1990, impasse was precluded, and unilateral implementation was justified, by the Council's failure to bargain in good faith and/or its reliance on a concerted campaign of violence to extract economic concessions from the Respondents and/or to drive Respondents into bankruptcy.
> 5. The strike referenced in Paragraphs 12(A), (B), and (C) of the Amended Complaint was, from its inception, an unprotected strike because of the Council's violent and unlawful purposes and methods (i) to extort economic concessions from Greyhound; (ii) to drive Greyhound into bankruptcy; (iii) to de-value Greyhound in order to take control of Greyhound; and/or (iv) to force a change in the Greyhound management responsible for Greyhound's labor relations.
> 6. The strike referenced in paragraphs 12(A), (B) and (C) of the Amended Complaint was, from its inception, an unprotected strike because of the Council's failure to bargain in good faith.

On December 19, 1990, the General Counsel filed a motion to strike certain affirmative defenses and/or to require a bill of particulars. I reserved ruling on this motion until I heard evidence regarding the bargaining and the national case. On October 18, 1991, I invited an on-the-record discussion of procedural issues yet to be decided and, in the course of that discussion, Respondent narrowed and clarified its affirmative defenses to cover basically union-sponsored violence and union conflict of interest. In its brief, the Respondent describes its affirmative defenses as follows: (1) ''The [Union's] concerted campaign of violence and coercion to extract bargaining concessions violated its duty to bargain in good faith and independently legitimized Greyhound's unilateral implementation of its proposals irrespective of impasse''; and (2) ''The [Union's] status as competitor for control and ownership of Greyhound made the [Union] incapable of bargaining in good faith and bars all claims of Section 8(a)(5) liability after the [Union] became a competitor.''[4]

In order to evaluate properly the affirmative defenses, I asked the Respondent to provide generally an offer of proof of what evidence it would submit in support of its defenses. Respondent describes the evidence it wishes to introduce in support of its affirmative defenses as follows: As to violence, the Respondent states that it intends to present approximately 15 witnesses who will testify about union plans to gain economic concessions through incitement of violence and the same number of witnesses to make causal connection between the incitement and the subsequent violence (Br. 90). As to conflict of interest, the Respondent proffers evidence that ''by at least early April 1990,'' the Union had hired a ''takeover specialist'' to assist in a hostile takeover of Respondent through a union-sponsored ''employee stock ownership plan'' (ESOP) and that, on May 29 and June 1, letters were sent by that specialist insisting that management be fired and an ESOP takeover commence. Thereafter, the Union utilized an investment firm to effect a hostile takeover (Br. 86).

The motion to strike the violence and conflict-of-interest affirmative defenses need not be decided in a vacuum. Except for the General Counsel's reservation of certain motivation evidence, which is not pertinent here, I have received all of the evidence on the national issues, including what took place during bargaining, the causation of the strike, and some of its aftermath. The record has been made and the motion can be decided on this record, the Respondent's offer of proof, and the law.

Contrary to the Respondent's contention, and a premise for its position, there is no legal precedent for the proposition that union-sponsored strike violence constitutes bad-faith bargaining under Section 8(b)(3) of the Act. Indeed, the Supreme Court, in *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960), held that unprotected union-sponsored conduct away from the bargaining table does not amount to a violation of Section 8(b)(3) (id. at 490). In *Insurance Agents*, the union's conduct included ''harassing tactics,'' sit-in activities at the employer's premises and other basically unprotected conduct which, according to the Court, would justify discipline of the employees involved. 361 U.S. at 480, 493–495. But, the Court said, simply because certain union activity ''is not protected against disciplinary action does not mean that it constitutes a refusal to bargain in good faith.'' (Ibid.) Thus, employee violence is generally handled through the employer's right to discipline employees for individual misconduct; union-sponsored violence is generally handled through the mechanism of Section 8(b)(1)(A) of the Act and the invocation, where necessary, of state and local

[4] In his brief in support of the motion to strike, the General Counsel has apparently dropped his objection to defense number 6. Moreover, although the parties have heavily briefed the striking of defense number 2, I see no need to strike that defense at this time because all the evidence has been received on that point, as well as on defense number 6. I am not prepared to decide on the validity of these particular defenses now, but shall consider the issues after full briefing on the merits. Thus, these defenses are still in the case.

law. The Respondent has availed itself of these remedies in its dispute with the Union. But Congress, the Board, and the courts have not provided a further remedy insofar as making union-sponsored violence a violation of Section 8(b)(3) of the Act.

It is, of course, true that, in certain circumstances, an employer's bargaining obligation may be curtailed by union bargaining tactics. For example, a strike in support of a union's unlawful insistence to impasse on permissive subjects of bargaining—itself a violation of Section 8(b)(3)—''suspends an employer's statutory bargaining obligation.'' See *Chicago Tribune Co*., 304 NLRB 259, 260 (1991), citing *Nassau Insurance Co*., 280 NLRB 878 (1986). And an employer may refuse to meet or bargain with a union because of flagrant strike violence that interferes with the bargaining process, as long as that situation continues. See *Kohler Co*., 128 NLRB 1062, 1064 fn. 5, 1080 fn. 34, 1087–1088, and 1175–1176 (1960), enfd. in part and remanded in part 300 F.2d 699 (D.C. Cir. 1962), supplemented by 148 NLRB 1434 (1964), enfd. 345 F.2d 748 (D.C. Cir. 1965); *Union Nacional de Trabajadores (Carborundum Co.)*, 219 NLRB 862, 863 (1975), enfd. 540 F.2d 1 (1st Cir. 1976), cert. denied 429 U.S. 1039 (1977). The Respondent has also availed itself of these defenses in this case. The Respondent argues that the Union improperly insisted to impasse on permissive subjects of bargaining. Evidence on this point has been received and that defense remains in the case. Further, on March 18, 1990, Respondent's negotiators walked out of a negotiating session and refused to meet with the Union because of strike violence, according to the testimony of Vice President Anthony Lannie. This evidence is likewise in the record, but Respondent's refusal to meet on this occasion was not alleged to have been unlawful and the bargaining thereafter resumed.

The Respondent's violence defense is essentially addressed to the allegations that it unlawfully insisted to impasse upon ADO [Active Duty Operator] language from the beginning of negotiations, that it unilaterally implemented terms of its last contract proposal on March 2, and unilaterally implemented the allegedly unlawful March 5 EBS proposal. Such violations are not rebutted by evidence of union-sponsored strike violence. See *Kohler*, supra at 1086. An affirmative defense is not triable simply because it is asserted by a respondent in litigation; it must be recognized as warranting the dismissal of alleged complaint violations. See *Chicago Tribune Co*., supra at 260.[5]

In this connection, Respondent's heavy reliance on *Johns-Manville Products Corp. v. NLRB*, 557 F.2d 1126 (5th Cir. 1977), denying enf. 223 NLRB 1317 (1976), cert. denied 436 U.S. 956 (1978), is misplaced. First of all, I am bound by Board law and, to the extent that this decision differs from Board law, I cannot rely on it. Moreover, the case is distinguishable. In *Johns-Manville*, the Fifth Circuit refused to enforce the Board's order based on a finding that an employer's hiring of permanent replacements after a lockout violated Section 8(a)(3) and (1) of the Act because of its adverse effect on employee rights, notwithstanding the employer's asserted business reason, and Section 8(a)(5) and (1) because the permanent replacement of all unit employees ''completely destroyed the bargaining unit'' and ''constituted a withdrawal of recognition.'' (223 NLRB at 1317–1318) The court, however, found (557 F.2d at 1133–1134), contrary to the Board, that the employees were engaged in an in-plant strike which justified their being permanently replaced under *NLRB v. Mackay Radio & Telegraph Co*., 304 U.S. 333 (1938).

Unlike the Respondent's position in the instant case, the Fifth Circuit's approach does not involve an 8(b)(3) defense to an 8(a)(5) violation. The employer was entitled to hire permanent replacements—the pertinent alleged violation therein—because of what the court viewed as a strike. The unprotected conduct of the employees—in-plant sabotage and disruptions—was used by the court to reach its determination that the employees were engaged in a strike, not as a defense in and of itself. To the extent that the court could be viewed as suggesting a defense based on in-plant sabotage, this would be flying in the face of *Insurance Agents*, supra, which clearly holds that an in-plant strike, unprotected under *NLRB v. Fansteel Metallurgical Corp*., 306 U.S. 240, 256–257 (1939), does not amount to a violation of Section 8(b)(3).

Significantly, the record in this case—and the bargaining evidence is all in—reveals no nexus between the asserted violence defense and the alleged employer violations. I believe that this is a necessary predicate for such an affirmative defense. For example, even assuming some recognition of a violence defense in *Johns-Manville*, the evidence in that case clearly showed that the employer's reason for hiring permanent replacements was because of the in-plant sabotage and disruption. See 557 F.2d at 1132. And in another case on which Respondent relies, *Union Nacional*, supra, the employer specifically refused to meet with the union because of the union threats and violence. See 219 NLRB at 863. Indeed, in *Kohler*, the Board specifically found that the employer did not ''rely on any acts of coercion or violence as a reason for'' its alleged unlawful conduct, that is, entering into negotiations after a certain date ''with [the] intent to avoid an agreement.'' 128 NLRB at 1086 fn. 44.

Not only did Respondent not rely on union violence as a reason for the unilateral implementation of terms of its last contract offer or—with exceptions I shall discuss below—any of the other allegations against it, but there is no natural connection between the violence and the conduct alleged to have been unlawful. Moreover, where the record in this case showed that conduct alleged to have been unlawful was connected with violence, I admitted the evidence. Thus, on this record, union violence was raised by Respondent's witnesses in essentially three contexts—apart from the filing of Section 8(b)(1)(A) charges and seeking state and local remedies to halt the violence. First was Vice President Lannie's testimony that he broke off negotiations on March 18, 1990, because of union violence. That evidence is in the record but it is specifically tied to a specific refusal to meet which might otherwise have been a violation. See *Union Nacional*, supra. Second, Lannie testified that he drew up the EBS proposal and sent it to the Union on March 5, 1990, in part because of the effects of union violence. Even though he did not give the Union this reason for making the proposal, he said he considered such violence and I therefore admitted the evidence; I will consider it in all the circumstances when I

[5] My conclusions with respect to the union violence defense are not based on the fact that the General Counsel refused to issue a complaint on Respondent's charge that union violence amounted to an 8(b)(3) violation.

decide the merits of the EBS issue. Obviously, an employer's asserted business justification for proposing a clause alleged to have been discriminatory must be considered in assessing the alleged violation. See [*NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967)]. Third, Lannie also testified that he refused to provide certain information concerning strike replacements to the Union upon its request because of strike violence. I also admitted this evidence because an employer's refusal to provide such information may be excused if there is a clear and present danger that it could be used for retaliation. See *Chicago Tribune Co*., 303 NLRB [682, 687–688] (1991).

In contrast with the above evidence of nexus between asserted violence and employer conduct alleged to be unlawful, the Respondent's broad-based affirmative defense allegations concerning violence have no basis in reason or in the relevant case law. In short, an alleged employer bargaining violation is not excused by union violence absent some rational connection between the two. Accordingly, I shall strike affirmative defenses 3, 4, and 5 insofar as they relate to union-sponsored violence.[6]

Respondent also asserts that certain alleged violations dating from early April 1990 are subject to its conflict-of-interest defense. In support of this defense, the Respondent alleges that the Union hired a takeover specialist by ''at least early April 1990'' and that the takeover specialist insisted, in letters dated May 29 and June 1, 1990, that Respondent's ''management be fired and an ESOP takeover commence'' (Br. 86). Initially, I note that these allegations postdate the essential allegations of Section 8(a)(5), (3), and (1) which allegedly caused and prolonged the strike. Moreover, this alleged defense does not amount to a disqualifying conflict of interest that would excuse what would otherwise be violations of the Act. There is no record evidence or assertion that Respondent withdrew recognition for this reason or explained its allegedly violative actions by reference to any conflict of interest on the part of the Union. Furthermore, Respondent's allegations of conflict of interest do not fit into any of the categories of union misconduct that have been recognized in the case law as justifying refusals or failures to bargain. See *Universal Fuels*, 270 NLRB 538, 540 (1984), and cases there cited. There is no assertion that the Union effected a purchase of Respondent, that it controlled, or even influenced, Respondent or its bargaining positions because of any ownership interests. Even a cursory reading of this record would render strained, at the very least, the suggestion that the Union was in effect sitting on both sides of the bargaining table. Nor is there any basis for the assertion that the Union was a business competitor of Respondent. An alleged conflict of interest must be proximate and substantial, not remote and speculative. See *NLRB v. David Buttrick Co*., 399 F.2d 505, 507–508 (1st Cir. 1968).

Thus, there is no basis for the Respondent's conflict-of-interest allegations as a defense to its alleged violations. I shall therefore strike affirmative defense number 5 insofar as it alleges this conflict of interest.

In accordance with the above discussion and analysis, I shall not only strike Respondent's violence and conflict-of-interest defenses, but I shall not receive any evidence on these matters in this proceeding. I want to make one other point here with respect to the alleged violence defense. If this defense were not stricken, I do not believe I could limit the evidence of violence as the Respondent contends. I would be compelled, for reasons of fairness and completeness of the record, to litigate not only issues of union sponsorship, but the extent and severity of the alleged violence as well as condonation or provocation, which would bring into play responsibilities on both sides, as the General Counsel and the Union contend. This would in effect result in the litigation of the entire case since so much of the local case has to do with these issues. There would be no way, in my view, to limit the litigation of the violence affirmative defense to less than the entire case, or most of it, and the efficiencies of scaling down the litigation would be lost. In short, were I to deny the motion to strike the violence defense, my decision on severance, which is discussed below, would be different.

Philip E. Bloedorn, Benjamin Mandelman, Joyce Ann Seiser, and *Paul Bosanac, Esqs*., for the General Counsel.

Rosemary M. Collyer, Mark E. Baker, Michael A. Bazany Jr., and *Kris D. Meade, Esqs*., of Washington, D.C., and *Lawrence J. McNamara* and *Jennifer G. Jackson, Esqs*., of Dallas, Texas, for the Respondent.

Martin J. Burns, Esq., of Chicago, Illinois, and *Jeffrey Freund, Esq*., of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case involves unfair labor practice complaint allegations against Respondent arising out of its conduct during negotiations between it and the Charging Party Union (the Union or the Council) from late 1989 through early 1990, the strike by the Union that began on March 2, 1990, and the dealings of the parties thereafter.[1]

The case opened on January 15, 1991. After resolution of certain preliminary matters, the evidentiary hearing commenced on May 6, 1991, based on a 112-page consolidated amended and corrected complaint issued on April 15, 1991, that incorporated a number of outstanding complaints and

[6] The Respondent's reliance on other cases such as *Laura Modes Co*., 144 NLRB 1592 (1963), and its progeny is also misplaced. These cases are distinguishable. They do not recognize a defense of violence to an alleged 8(a)(5) violation, but rather treat union violence in a remedial context. A union found to have engaged in flagrant violence and coercion is disqualified as the employees' majority bargaining representative until or unless it demonstrates its majority in a Board election. Here, the Union's majority status was unchallenged. The Respondent did not withdraw recognition or seek an election or the decertification of the Union. Rather, it continued recognizing and bargaining with the Union. Moreover, as a practical matter, any in futuro remedy under *Laura Modes* would not affect the alleged violations in this case.

[1] An unfair labor practice complaint also issued against the Union alleging acts of violence, coercion, and other strike misconduct in violation of Sec. 8(b)(1)(A) of the Act. That case was settled by agreement, with a nonadmissions clause, that provided for the entry of a Board order, dated June 19, 1990, enforced by entry of an order, dated June 27, 1990, by the United States Court of Appeals for the Fifth Circuit, prohibiting the Union from interfering with employee rights under the Act.

amendments. This complaint alleges that Respondent violated Section 8(a)(5), (3), and (1) of the Act by insisting on and thereafter implementing contract proposals containing so-called active duty language (ADL), which was itself unlawful because it discriminated against strikers and forced a waiver of reinstatement rights. It also alleges a violation of Section 8(a)(5) and (1) because Respondent implemented all of its contract proposals, including ADL, in the absence of a valid impasse. The complaint also alleges that Respondent violated Section 8(a)(5), (3), and (1) of the Act by insisting upon and implementing an ''experience based seniority'' provision (EBS). The complaint further alleges that the Union's March 2, 1990 strike was an unfair labor practice strike from its inception and was prolonged by unfair labor practices, or, if not, was converted thereafter to an unfair labor practice strike, and, accordingly, Respondent violated Section 8(a)(3) and (1) of the Act by failing immediately to reinstate the strikers upon their unconditional offer to return to work on May 22, 1990. The complaint alleges other violations of Section 8(a)(5) and (1) of the Act in Respondent's subsequent unilateral implementation of terms and its failure to provide requested information to the Union, as well as certain independent violations of Section 8(a)(1) of the Act. The Respondent filed an answer denying the essential allegations in the complaint.

The complaint includes numerous other allegations of Section 8(a)(3) and (1), most relating to unlawful threats and acts of coercion and the discriminatory discharge of some 250 individual strikers for alleged but mistaken or condoned strike misconduct. These allegations were identified as the local issues or the local case. Respondent's answer also denied these allegations.

The first part of the hearing dealt with the bargaining related allegations that were identified as the national issues or the national case. After both sides presented evidence, the hearing on this discrete phase of the national case ended on October 18, 1991. Thereafter, I issued a decision and order, dated December 30, 1991, severing the national case, a portion of which had yet to be heard, from the local case. In addition, in that decision and order, I granted certain complaint amendments and struck two of Respondent's affirmative defenses. On March 12, 1992, the Board denied the General Counsel's appeal of the severance portion of my December 30, 1991 order. Thereafter, the national case resumed, and, after both sides again presented evidence, the record was closed on July 14, 1992.

The national case consumed 36 days of trial, with some 5300 pages of transcript and thousands of pages of exhibits. The parties filed opening briefs, totaling over 700 pages, and reply briefs, totaling nearly 300 pages. I have read and considered these briefs, the last of which were filed on December 23, 1992.

On April 16, 1993, the parties notified me of a possible settlement in both the national case, which was ripe for decision, and the local case, which had not yet been heard. I stopped work on the decision in the national case and awaited the submission to me of a settlement agreement. Over a year later, on May 10, 1994, I received a motion setting forth a partial settlement and asking that I approve the settlement of all outstanding issues in both cases, save those dealing directly with EBS. Two hearings were held on the settlement, one on May 16 and another on August 16, 1994. In the interim, employees and individual Charging Parties were notified of the terms of the partial settlement and given the opportunity to file objections to it. I also invited additional briefs from the parties with respect to the settlement, which I have read and considered.

Because of the content and context of the partial settlement agreement, which is described more fully below, and to facilitate consideration of it, I will order that the national case and the local case be unsevered and reconsolidated. It is also ordered that the EBS allegations be severed for separate determination. Since the parties have been unable to settle allegations involving Vermont Transit, a subsidiary of Respondent, those allegations will also be severed for further consideration. This decision contains both my recommended approval of the partial settlement and my resolution of the outstanding EBS issues.

Based on the entire record,[2] including the stated positions of the parties, the testimony of the witnesses and my observation of their demeanor, as well as the materials submitted to me with respect to the partial settlement and all objections and responses thereto, I make the following

FINDINGS OF FACT

I. JURISDICTIONAL MATTERS

At all relevant times, the Union or Council was composed of 19 local unions that represented Respondent's employees in particular geographical areas.[3] It is a labor organization within the meaning of Section 2(5) of the Act.

Respondent, a corporation with its home office in Dallas, Texas, and terminals located throughout the United States, is engaged in the interstate and intrastate bus transportation of passengers and freight. It derives gross annual revenues of over $1 billion, and annually purchases and receives at its places of business in each of the 48 contiguous States goods and materials valued in excess of $50,000 directly from outside each such State. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[4]

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[2] ALJ Exhs. 12 and 13 are looseleaf binders containing all the exhibits received in evidence at the hearing in the national case. Other reserved exhibits were received as indicated in this decision. On the last day of the settlement hearing, a group of nine exhibits dealing with the settlement were received in evidence and numbered consecutively beginning with ALJ Exh. 12. To avoid confusion I will designate the binders as ALJ Exhs. 12a and 13a.

[3] By the time of the hearing the 19 locals had been reduced to 15. Later, the Council reconstituted itself as one national local with the same representation rights as were shared by the Council's constituent locals. Still later, after the Council entered into a partial settlement in this case, it came under the trusteeship of its parent, the Amalgamated Transit Union.

[4] The original caption and the complaint in this case identify Respondent as a debtor-in-possession. Respondent was in bankruptcy for much of the trial. It filed for protection under Chapter 11 of the Bankruptcy Code on June 4, 1990, and emerged from bankruptcy on October 31, 1991. I have therefore deleted the caption identification of Respondent as a debtor-in-possession.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Overview of the National Case*

The Union has represented employees of Respondent or its predecessors for many years. Effective March 19, 1987, Respondent and related entities purchased the bus operations of one of the predecessors, Greyhound Dial Corporation. Respondent's chairman and chief executive officer during times material herein was Fred G. Currey, who exercised majority control of the voting stock of Respondent. Respondent's president was Frank Schmeider. Another stockholder was Executive Vice President P. Anthony Lannie, who was also Respondent's chief negotiator in the 1989–1990 negotiations.

Prior to the strike of March 2, 1990, Respondent employed between 12,000 and 20,000 employees, 9000 of whom were represented by the Union. Most of the represented employees were drivers. About 5800 drivers were working immediately before the strike; some 500 were on furlough. In addition to drivers or operators, the Union represents some mechanics and helpers, as well as office employees at the Des Moines, Iowa accounting center and at the Charlotte, North Carolina and Omaha, Nebraska telephone information centers, known as TICs.

The existing 1987–1990 agreement of the parties, which included a no-strike clause, was to expire at midnight on March 1, 1990. After the Union requested that the parties meet to negotiate a successor contract, the parties agreed to begin negotiations on November 2, 1989, in Scottsdale, Arizona. The Union's bargaining team was composed of Council President Ed Strait, the Union's chief negotiator, Council Secretary-Treasurer Smith Williamson, and several local presidents. Two officials from the Union's parent International, Jim Hayes and Tommy Mullins, also joined the negotiations. In addition to Lannie, the Respondent's chief spokesman, Respondent's bargaining team included Robert Tancos, senior director of labor relations, and Attorneys Carl Taylor and Lawrence McNamara.

The parties commenced negotiations on November 2 as scheduled. That day and the next were devoted to an exchange of proposals. The parties next met from December 4 through 6, 1989, in Daytona Beach, Florida. They again reviewed their respective proposals and reached some agreements on noncontroversial matters.

On December 12, 13, and 14, the parties again met in Daytona Beach. The parties reached some further agreements, but major issues remained unresolved. The first indications of a possible deadlock appeared at this time. Lannie stated that the parties were at stalemate on two major issues, Respondent's ADL proposal, which the Union resisted every time it was raised, and Respondent's economic proposal. Both issues would remain sticking points throughout the rest of the negotiations. I shall discuss ADL in greater detail later in this decision.

As a result of Lannie's stalemate statement, the parties agreed that Currey should be invited to appear before the full Council, which was composed of all the local union presidents and was meeting in Phoenix, Arizona, on January 8, 1990. The parties also scheduled bargaining sessions in Phoenix for the same week. When the parties met on January 4, the Respondent distributed an updated proposal incorporating the agreements to that point. The Union made a number of changes in its noneconomic proposals, but the Respondent did not move from its position on these matters. On January 5, Lannie, who had not been present the day before, distributed Respondent's office employee wage proposals. The parties reached some agreements on relatively minor matters. At the end of this meeting, Strait stated that the Union had made some significant movement and he expected some from the Respondent. Lannie responded that Respondent had no additional proposals, but was willing to listen to suggestions from the Union. The parties met again on January 6. At this meeting the parties discussed Respondent's recently submitted TIC and office employee proposals. The discussion yielded only a few agreements on these matters. At the end of the January 6 meeting, the parties agreed that they would meet again on January 12, after the scheduled Council meeting on January 8, at which Currey was to appear.

On January 8, Currey appeared before the Council and attempted to convince the Council members to accept the Respondent's outstanding proposal. His presentation was followed by a question-and-answer period. The Council members were not very receptive to Currey's presentation. After this meeting, Strait told Lannie that the Union would reject the Respondent's proposal. As a result it was agreed that Currey would make another presentation to the Council on January 10.

In his January 10 presentation to the Council, Currey read a prepared statement setting forth his view that the parties were at impasse ''on the broad issues,'' particularly on the issue of subcontracting as to which he proposed implementation on March 1. This statement startled the Council. Although Respondent had sought to remove the existing prohibition against subcontracting ''main line service,'' which the Union firmly opposed, the parties' previous discussions on this issue had been general and nonspecific. There was no inkling in the negotiations that Respondent had immediate plans for such subcontracting. After his prepared remarks, however, Currey outlined an elaborate and detailed plan for major subcontracting, complete with visual aids. Hayes objected that this matter should not be raised in a Council meeting, but should be submitted and discussed in a formal negotiating session. Both Hayes and Strait also objected to Currey's statement that the parties were at impasse.

Bargaining resumed on January 12, but the session was a very short one. Lannie provided the Union with Respondent's map of intended subcontracting routes as well as a redraft of its outstanding proposals together with whatever changes had been agreed upon to that point. These proposals were subsequently referred to collectively as Respondent's January 10, 1990 proposal. In a January 10 letter to Strait, Lannie had mentioned the redraft as well as a confirmation of his view that the parties were at impasse, in light of the Union's rejection of Respondent's outstanding proposal and the fact that Respondent had no other proposals ''to make.'' Strait offered interest arbitration to resolve the outstanding issues, but this was rejected by Respondent. Strait then stated his intention to submit the Respondent's contract proposal to the membership for a vote on whether members would accept it.

In the next few weeks the parties exchanged increasingly derogatory communications and each tried to influence the membership ratification vote. The Union urged its members to reject the Respondent's proposal. Respondent, in its official employee newsletter, Greyhound Lines, which contents

were controlled by Lannie and Currey, defended the proposal and asked for its support. Both the Union and the Respondent used communications to the employees during the remainder of bargaining in order to set forth their positions. Some will be discussed more fully hereafter.

On February 9, 1990, the Union received the results of its mail ballot vote of the membership on the Respondent's January 10 proposal. By an overwhelming vote, the employees rejected the proposal and authorized the Council ''to take any action deemed necessary at any time up to and including strike action.'' Strait notified Lannie of the vote and they scheduled another bargaining session for February 16 in Phoenix.

In the meantime, Respondent authorized nationwide advertising for ''experienced, qualified permanent replacements,'' essentially drivers. These ads, which specifically mentioned the possibility of a strike upon the expiration of the existing contract at midnight on March 1, began running in newspapers in 36 major cities on February 8, 1990. A typical ad stated that the first 100 applicants ''per location'' would receive $100 for completing an application, $150 upon passing a DOT physical and upon being called for work, and other sums for remaining available for work. In mid-February, Respondent began training these drivers; they completed their training and were ready to begin work on March 1.

The parties met again as scheduled on February 16 about 9 a.m. The morning session simply involved an exchange of views, except for the Union's presentation of a new proposal reducing its economic demands. The parties broke sometime during the morning so that Respondent could consider the Union's new proposal. The parties reconvened at 4 p.m., at which time Respondent formally rejected the Union's proposal. Lannie presented and read a letter reiterating the Respondent's inability to move on its economic proposal and inviting another union proposal. According to his notes of this meeting, Lannie stated that Respondent had offered all it could afford, but that ''we are willing to listen to any counterproposal on how those dollars can be applied, as you suggested.'' After further unproductive discussions the meeting ended.

For the next 10 days the parties continued their war of words in an exchange of correspondence. The Union sought the intervention of a Federal mediator, an offer which the Respondent initially rejected; however, the parties did thereafter agree to the use of a mediator on March 1. Also at about this time, indeed beginning in late January, the parties exchanged correspondence concerning financial information requests by the Union with respect to subcontracting as well as Respondent's economic proposals. Some of the activity and communications of the parties during this period involved the Union's threat to strike and the Respondent's threat to implement the terms of its outstanding offer upon the expiration of the old contract.

The parties met again on February 25, and decided to continue negotiations through subcommittees dealing with particular issues. Any agreements were then to be considered by the main bargaining committee. These deliberations, which took place on February 26, 27, and 28, were held under a so-called ground rules agreement, prepared by Respondent's attorney, Carl Taylor, and signed by representatives of both parties, which attempted to preserve Respondent's position that an impasse existed. The subcommittee deliberations resulted in a number of agreements showing movement on both sides. On February 28, the main bargaining committee met and a new composite proposal was prepared to reflect the subcommittee agreements; that proposal, entitled ''Joint Subcommittee Recommendation,'' was submitted to the Council on the morning of March 1.

The Council rejected the recommendation and directed that a counterproposal be prepared. Such a counterproposal was prepared, reducing further the Union's economic demands, and it was submitted to the Respondent on March 1. The Union's March 1 proposal assumed that the existing agreement would carry over, absent the changes indicated in the proposal and other previously agreed-on terms. At this point, the parties began utilizing Federal Mediator Ron Collotta. Representatives of the parties and Collotta met to discuss the Union's latest proposal and the Respondent's representatives asked for more time to study and cost the proposal. The parties then dispersed to different hotels.

Instead of responding directly to the Union's proposal, the Respondent prepared a new one, its last and final offer before the midnight expiration of the old contract. This proposal, which was given to Collotta about 10 p.m. to present to the Union, set forth a number of new concessions by Respondent, together with the subcommittee recommendations that had been rejected by the Council, and, unless modified by these terms, the remainder of the Respondent's January 10 proposal. The offer included a condition that, if the offer were accepted by the Union, it would be implemented immediately, and, if it were not ratified by March 15, the offer would lapse and Respondent would revert to its January 10 proposal as modified by its February 14 subcontracting proposal.[5]

The Council met about 11 p.m. and, after some discussion of the offer transmitted by Collotta, voted to reject the offer. During the discussion, Hayes noted that ADL was still part of the Respondent's final offer. He mentioned other provisions still in the offer which he viewed as unacceptable. The uncontradicted testimony concerning this discussion makes it clear that the Union understood that the offer had to be accepted by midnight and believed that the Respondent would be implementing something at that point. Three votes were taken at this meeting. The first, to send the offer to the membership for a vote without a recommendation, was rejected. The second, to accept the Respondent's March 1 offer, was also rejected. The third, to initiate a strike upon expiration of the old agreement at 12:01 a.m., was approved.

Following the unsuccessful 11th hour efforts set forth above, the Respondent implemented its January 10 proposal, including, among other provisions, ADL, a new incentive-based pay system, and changes in seniority, but excluding the subcontracting provision;[6] and the Union struck. The Union's

[5] The reference in the offer to a February 14 subcontracting proposal was apparently to a one-sheet document indicating a concession on Respondent's part on the extent of what it would subcontract. Alternatively, Respondent agreed, if the Union made certain concessions, to ''maintain the present prohibition on subcontracting any main line service.'' The document was first presented to Council representatives during the week of February 25.

[6] Respondent stated that it would not subcontract main line service until ''the details had been bargained with'' the Union; in addition, a March 2 memo to employees suggested that Respondent was ''working'' on a new subcontracting proposal.

strike announcement said that the strike was called as a result ''of the Company's insistence on implementing its January 10, 1990'' proposal. The Respondent attempted to, and did, continue to operate, relying on nonstrikers and crossovers, recalling furloughed drivers and using permanent replacements.

On March 5, in a telefax letter to Strait, Lannie proposed and submitted an entirely new contract provision, EBS, which granted additional seniority to employees based on previous driving experience, a subject that had not previously been discussed in negotiations. Lannie asked for an immediate response and said that, if he had not heard one by March 8, he would assume the Union accepted EBS. On the same day he received the telefax letter from Lannie, Strait responded, calling the Respondent's proposal of EBS an unfair labor practice because it was not presented in negotiations and bargained to ''impasse,'' demanding its retraction, and asking that it not be implemented ''pending further face-to-face negotiations.'' Despite this and another request to resume negotiations, the Respondent implemented EBS without further contact or bargaining and put off meeting with the Union until after a March 12 session between the Union and Federal mediators. In a March 13 letter to Strait, Lannie stated that Respondent would not ''abandon'' EBS in any subsequent discussions. I shall have more to say about EBS later in this decision.

The parties met again on March 17 and 18 in Tucson, Arizona. Two Federal mediators were also present. The Union had prepared and submitted still another counterproposal, further paring down its demands and agreeing to some of Respondent's. On the first day of this meeting, Lannie stated it was difficult for him to carry on negotiations in the face of strike violence. Strait responded that one of the strikers had been killed by violence on the other side. According to Respondent's notes, Strait also said that the Council was not responsible for the ''violence and crazies.'' Strait again objected to the way Respondent proposed EBS and restated his view that this was an unfair labor practice. Lannie took the position that the Union rejected an opportunity to bargain. Lannie also said that the March 1 offer was ''no longer on the table'' and that Respondent was simply interested in ''counters from the Union.'' Discussions on the Union's counteroffer yielded some agreements; Respondent accepted some parts of the Union's counteroffer and rejected others. Other than these changes, Lannie indicated that Respondent was standing by its January 10 proposal, with the subcontracting modifications suggested in February and the implemented EBS proposal. Neither ADL nor EBS was bargained about; and neither party indicated that it would change its position on these matters. The next morning, Respondent's representatives broke off negotiations because Lannie stated that Respondent had received more reports of strike violence.

Although the next 6 weeks produced some informal meetings between representatives of the parties, the next actual bargaining session took place on May 5, in the presence again of Federal mediators. The Respondent submitted and described a new proposal which was significantly less generous than its previous proposals. There was no change in ADL and EBS. The Respondent specifically stated that EBS ''stays.'' Lannie explained that Respondent's regressive proposal was the result of its deteriorating financial circumstances. After a caucus, the Union rejected the new offer protesting its regressive nature. Further discussions proved unfruitful, including discussions about the possible reinstatement of strikers and the availability of positions to which they could be reinstated. Lannie told union representatives that the Respondent had reached, at this point, a ''full complement'' of 3800 drivers.

On May 7, Respondent formalized its May 5 proposal in a letter to Strait, and, on May 15, Lannie advised the Union of Respondent's intent to implement its May 5 proposal ''immediately.'' The Union responded, in a letter dated May 18, stating that it viewed Respondent's recent implementation of its May 5 proposal as a separate additional unfair labor practice. It pointed out that, even though it had rejected the new proposal on May 5, it did not intend to preclude further discussions. The letter also stated that, even though the Union believed that Respondent's unfair labor practices caused and prolonged the ongoing strike, it nevertheless wanted further bargaining and an agreement, even if it required the Council ''to modify our previous proposals.''

On May 22, 1990, the Union made an ''unconditional offer to return to work immediately'' on behalf of all employees in the bargaining unit. Lannie responded, in a letter dated the same day, acknowledging the offer and stating that only a ''limited number of positions [are] available at this time.'' The Respondent took the position, contrary to the Union, that the strike was an economic strike. Addressing what he considered delays and flaws in Respondent's reinstatement procedure, the Union's attorney, Martin Burns, wrote Respondent on June 26, 1990, reemphasizing that the Union's offer to return was unconditional. He also advised Respondent that it was the Union's view that the strike was an unfair labor strike and strikers were entitled to reinstatement under terms and conditions existing prior to the commission of unfair labor practices and to positions substantially equivalent to their prestrike jobs.

As a result of the procedure established by Respondent for the recall of strikers and some of the statements made in explanation of the procedure and job availability, as well as the implementation of EBS, the Union made a number of requests for supporting information which it said was necessary for representation and bargaining purposes. The Respondent replied to some of these requests, but refused to supply or delayed in supplying some of this information, notably information concerning the number of vacancies available to returning strikers, an issue to which I will refer later in this decision.

B. *The Partial Settlement*

The proposed partial settlement between Respondent, the Union, and the General Counsel is basically reflected in three separate agreements, two between Respondent and the Union (the settlement agreement and the recall memorandum of understanding) and the other between those two parties and the General Counsel (the memorandum of understanding). All three parties join in a motion asking for approval of partial settlement and dismissal of complaint. This essentially resolves all complaint issues in both the national and the local cases, except for the allegation that Respondent violated the Act by proposing and implementing the assertedly unlawful EBS clause.

The terms of the partial settlement are as follows. The Respondent and the Union have entered into a new collective-bargaining agreement, which runs through January 31, 1999, and is contingent on approval of the partial settlement. They have also entered into other separate interim agreements and have set in place a system of regular meetings to maintain and strengthen their bargaining relationship. Thus, the parties have agreed to settle all the 8(a)(5) and (1) allegations in the complaint, except for that which may flow from the implementation of an allegedly unlawful EBS proposal. The Union will withdraw the charges underlying those allegations and the General Counsel agrees to dismiss them.

The parties have agreed to a monetary or make-whole remedy for employees allegedly entitled to backpay. Such a remedy would have been warranted in connection with the allegations in both the national and the local cases, had the General Counsel succeeded in proving his case. The moneys in the backpay remedy are to be distributed in cash to the employees from a trust established by the Bankruptcy Court to hold assets to satisfy the General Counsel's proofs of claim should violations be found by the Board.

As more fully set forth in the memorandum of understanding, the General Counsel filed proofs of claim in the Respondent's bankruptcy case captioned In re *Eagle Bus Manufacturing, Inc.*, Cases 90–00985–B–11 et seq. (Bankr. S.D. Tex.). Respondent emerged from Chapter 11 protection on October 21, 1991, after the Bankruptcy Court entered an order confirming Respondent's plan of reorganization, overruling objections filed by the General Counsel and the Union. The order established a trust that continues to hold assets in escrow for the purpose of satisfying contested claims, including the backpay claim of the General Counsel. The Bankruptcy Court classified the General Counsel's claim as a general unsecured claim and estimated its value at $31.25 million. The court arrived at this figure by discounting an assumed backpay claim of $125 million based on its assessment of the likelihood of success or settlement of the unfair labor practice case and the debtor's ability to pay. The claim was permitted the same degree of recovery as other unsecured claims, some 31 cents on the dollar. As a result, securities in the reorganized Respondent with a value of approximately $10.5 million were deposited in trust for the purpose of satisfying the backpay claim should it ever mature. It is estimated that, as of August 16, 1994, the assets allocated to the General Counsel's claim, which are being administered by an independent trustee, have increased in value to some $17 million.[7]

The General Counsel and the Union appealed the order of the Bankruptcy Court, insofar as it classified the backpay claim as an unsecured claim and estimated its value, to the District Court for the Southern District of Texas. The district court affirmed the Bankruptcy Court on these issues. *NLRB v. Greyhound Lines*, No. B–91–021 et al. (S.D. Tex., May 10, 1993). Both the General Counsel and the Union appealed the district court's ruling to the United States Court of Appeals for the Fifth Circuit. I have been informed that the matter has been remanded to the district court pending final resolution of the settlement.

The memorandum of understanding provides that the appeals of the General Counsel and the Union will be withdrawn with prejudice. The parties, however, including the Respondent, have agreed to have the Bankruptcy Court orders on estimation, which were adverse to the General Counsel, vacated without affecting or disturbing the order confirming Respondent's plan of reorganization. It is represented that although the settlement is contingent upon the Bankruptcy Court allowing and authorizing distribution of the backpay claim, it is not contingent upon the court's agreement to vacate its orders and rulings on estimation. If the Bankruptcy Court approves the settlement, the distribution of the backpay moneys is to be accomplished by the General Counsel who shall have full discretion in the calculation and distribution of backpay, including that amount called for in any Board remedy for EBS should violations on that matter be found. The distribution will be in cash.

Respondent and the Union have also agreed on a general recall procedure that governs the return to work of former strikers in order of seniority by location. Many former strikers have returned to work, resigned, or retired. Former strikers who signed a recall list by July 1, 1993—whether recalled or not—are assured of continuation of seniority and pension service credit during the term of the strike and until they receive a recall offer. Former strikers have the right to decline recall and move to the furlough list and continue to accrue pension service credit until July 1, 1994. They may also opt to turn down an offer to a location other than their home location and stay on the recall list. Finally, the parties agreed to send additional notices to the approximately 1000 former strikers who had not contacted either the Union or Respondent by mid-1993 and they were given an additional year to sign up for recall. The General Counsel agrees with this recall procedure.

As a result of the recall procedure, which has already been implemented, reinstatement has been offered to 3366 employees and 1247 have returned to work, as of August 16, 1994. Except for one small group of employees whose reinstatement is being blocked by technical problems, less than 300 employees remain on the recall list. All of these individuals are awaiting recall to their particular home location, having declined recalls to other locations.

The complaint in the local case, which has not yet been tried, raises many issues concerning discharges for alleged strike misconduct and alleged incidents of coercion. The parties have negotiated a settlement of those issues and the General Counsel has no objection to that settlement. The Union will essentially withdraw all 8(a)(3) and (1) charges, except those underlying the EBS allegations, and the Union and the General Counsel jointly move to dismiss the applicable complaint allegations, except insofar as they may involve postarbitration review by the Board. Briefly, the settlement provides that the discharges of some 170 former strikers will be rescinded and they will be treated just as any other striking employees. Twelve of these discharged strikers will be permitted to retire, which would entitle them to greater benefits than if they were treated as discharged employees. Twenty-two of the allegedly unlawfully discharged employees will have their status determined by arbitration. Some of these employees will have an opportunity for postarbitration re-

[7] Contrary to the misunderstanding of some employees, the securities in the trust are not limited to stocks and bonds of the Respondent. The trustee is empowered to buy and sell securities in order to maximize the value of the trust.

view by the Board; the allegations involving these employees will be dismissed conditionally, with jurisdiction retained by the Board as described in *United Technologies Corp*., 268 NLRB 557 (1984). Those employees found after arbitration or subsequent review to be entitled to reinstatement will be treated like any other striking employee. Ten strikers, mostly those who were found to have committed criminal misconduct, will not be reinstated and will be entitled to no backpay after the date of their discharge.

The partial settlement also provides for the resolution of other issues between the parties. This includes the settlement of pending grievances, which were not the subject of complaint allegations, a separate RICO case brought by the Respondent against the Union, and the remainder of the bankruptcy litigation.

The partial settlement leaves for decision the complaint allegations in paragraphs 10(A) through 10(C) that Respondent's EBS proposal was violative of the Act and thus unlawfully implemented. Respondent and the Union have represented that ''[d]espite extensive, good faith efforts, the Company and the Council have been unable to negotiate a complete settlement concerning these specific allegations.'' There is no restriction on the Board's issuance of an order fully remedying the EBS allegations, except that the Respondent's liability for any monetary component of a make-whole remedy is to be fully and exclusively satisfied from the bankruptcy trust fund distributions discussed above. Some EBS issues, however, have been resolved in favor of striking employees. Respondent has agreed that no EBS credit would be offered to employees hired after September 1, 1991, and that, if EBS is found unlawful, all unreinstated strikers who signed recall lists before July 1, 1993, will be recalled to the extent that they have greater seniority than a working operator in the applicable location. Two other complaint allegations arguably touching upon EBS are also resolved. First, the parties have agreed to compromise any claim that, even if EBS were a lawful proposal, its premature implementation was nevertheless violative of Section 8(a)(5) and (1) of the Act. Second, the parties have agreed to dispose by settlement any allegation that the strike, which might have been found initially to have been an economic strike, was converted to an unfair labor practice strike by the proposal and implementation of EBS were it found to be an unlawful clause. The General Counsel agrees to these limitations.

Pursuant to my order of May 27, 1994, the parties undertook a process of notifying employees of the specific terms of the partial settlement and inviting employees and individual Charging Parties to submit questions or file objections to the settlement. Between 5000 and 6000 employees were mailed a summary of the settlement terms and all were given an opportunity to study the entire settlement package if they so desired. As a result of the notification process, unprecedented in my experience in Board settlement procedures, I received about 300 letters from employees. Most of the letter writers objected to the settlement. The letter writers, however, comprise only a small percentage of the total number of employees who were notified of the settlement and the procedure for filing objections. This may have been because most of the employees heeded the urgings of the Union and the Respondent not to object because the settlement was a good one. The General Counsel, the Union, and the Respondent filed responses to the letters and objections. I have considered the objections and the responses. I have also heard oral argument on the propriety of the partial settlement at a public hearing in Milwaukee on August 16, 1994, at which time I also heard the views of four employees in person.

Based on all the evidence submitted to me in this case, the pleadings, the positions of the parties, the settlement documents, the objections of employees and the responses thereto, but primarily based on my unique position of having lived with this case as its most objective participant for more than 3 years, I will approve the partial settlement and recommend its approval to the Board. The partial settlement effectuates the policies and purposes of the Act and it is in the public interest.

The partial settlement is essentially a non-Board settlement governed by the principles set forth in *Independent Stave*, 287 NLRB 740, 743 (1987). In that case, the Board said that, in deciding whether to approve such settlements, it would:

> examine all the surrounding circumstances including, but not limited to, (1) whether the charging party(ies), the respondent(s) and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practices.

This partial settlement satisfies the *Independent Stave* criteria.

With respect to factor 1 of *Independent Stave*, the partial settlement has the agreement of the major Charging Party, the Union, as well as the Respondent and the General Counsel. All have agreed to be bound. Although certain individual Charging Parties and the alleged discriminatees were not parties to the settlement agreement, they were fully notified of the settlement. In view of the urgings on the part of the Union and the Respondent that employees not file objections if they agreed with the settlement, it can fairly be inferred that, by failing to file objections, about 95 percent of the 5000 to 6000 potential discriminatees acquiesced in the settlement.

The objections I did receive do not warrant rejecting the partial settlement. Most of them fall within that category of competing interests that permissibly may be compromised by a bargaining agent in the context of a comprehensive strike settlement agreement. The Board looks favorably on such agreements. See *Energy Cooperative*, 290 NLRB 635, 637 (1988). And the Union's compromise was well within the wide berth of reasonableness permitted unions in these situations. See *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65 (1991).

Some of the employee objections concerned the ratification and content of the collective-bargaining agreement which is part of the settlement. Contract ratification is ordinarily an internal union matter. In this case the Union inter-

preted and applied its constitution and rules to exclude nonmembers from the ratification procedure and to include only those who retained active membership in good standing in their Greyhound local union or with the International as active Greyhound members at large. This was not an unreasonable interpretation and application. As for the contract terms themselves, this is a matter again within the province of the Union as bargaining agent. The Board does not monitor the terms of bargaining agreements and the remedy in this case, even if the General Counsel were to succeed, would not result in an order that the parties agree to particular terms of a contract.

Some of the employees objected to the amount of the backpay. These objections are not sufficient to justify rejection of the settlement. A full recovery of backpay amounts greater than those in the settlement depend not only on the complete victory of the General Counsel in proving that the strike was an unfair labor practice strike, but also on an ultimate determination that the employees may recover an amount greater that the trust amounts set forth in escrow by the Bankruptcy Court. In view of the constraints of the Bankruptcy Court's estimation order and the Respondent's financial situation, I cannot second guess the agreement of the parties to limit backpay to the trust assets. Although the district court agreed that the estimation order did not operate as a cap, it is clear that the recovery of moneys in addition to the trust assets is quite problematical. It would depend not only on Respondent's losing the case, part of which has not even been tried, but also on the eventual determination, after compliance proceedings and the establishment of a liquidated damage figure greater than the allocated assets in the trust fund, that such a figure could be recovered notwithstanding the Bankruptcy Court's order. The parties differ on this issue, but the Respondent insists that it will argue at that time that the trust fund assets are all that can be recovered. The point here is that such a determination can only come many years down the road when a liquidated damage figure is calculated and fixed. This uncertainty is so imposing that I cannot reject the parties' agreement to accept the trust assets as an appropriate figure now for the backpay claims of the employees.

Some employees objected to the recall procedures in the partial settlement. These objections do not warrant rejection of the settlement. There were complaints that the settlement does not provide for immediate reinstatement. The strike was alleged to have been an unfair labor practice strike requiring immediate reinstatement upon an unconditional offer to return. The General Counsel, however, might have lost on that issue. Even had he won before me, appeals would have delayed the actual recall of employees, except as vacancies arose in accord with Respondent's position that the strike was an economic one. The partial settlement allows for most drivers to be recalled consistent with a widely publicized recall signup procedure. Indeed, it is represented that almost all employees whose names appeared on the recall list have already been reinstated. This seems to have been a reasonable compromise in the circumstances. Other employees complained about being recalled to a different location. Although not all drivers are immediately recalled to the exact locations in which they worked before the strike, they are given an opportunity to designate five different locations to which they might accept recall on a national basis. This approach actually inured to the benefit of the employees, and it adequately accomodates Respondent's needs and the effort to get as many employees back to work as quickly as possible. As openings become available employees will have the opportunity to return to their preferred or home locations. Finally, some retirees complained about not having the opportunity to be reinstated to full-time positions. Apparently, between the inception of the strike and the date the new contract was announced, some 800 employees opted to retire. I find no evidence that these retirements were coerced. In view of Respondent's downsizing after the strike and its emergence from bankruptcy, only a finite number of full-time jobs were available to be filled. It was not unreasonable for the Union to agree that those jobs should be filled by those employees who had not opted to retire. In any event, all retirees will receive retroactive pension service credit from the date they went out on strike until the date of their retirement. They may also hold positions as part-time or seasonal employees. I find that the settlement fairly treats retired employees.

Six employees allegedly discharged unlawfully for strike-related misconduct filed objections to the resolution of their discharge and reinstatement cases. None of these matters have been tried because they are part of the local case. Two of the objections involved employees who were not alleged in the complaint as discriminatees. Another involved Roger Cawthra, who remains discharged since the General Counsel concedes that he cannot succeed in proving Cawthra's discharge was unlawful. I am in no position to second guess the General Counsel on this matter. The three other objecting employees were included in the complaint as discriminatees. They are given an opportunity to submit their cases, with union representation, to an arbitrator who will determine whether their alleged misconduct occurred or disqualified them from reinstatement. The resolution of these issues by arbitration in the context of the overall settlement is reasonable.[8]

Even though I may not have discussed all of the individual employee objections here, I have considered them all. And after considering them I do not find that they warrant rejection of the partial settlement. The Union and the Respondent entered into an overall strike settlement agreement that reasonably compromised competing interests. The General Counsel, who represents the public interest, agrees with the settlement. In these circumstances, I find that the partial settlement satisfies factor 1 of *Independent Stave.*

The settlement also satisfies factors 3 and 4 of *Independent Stave.* There is no evidence of fraud, coercion, or duress

[8] I have given special consideration to the objection of employee Howard C. Brown Jr., who appeared and spoke at the August 16 hearing in Milwaukee. I also met with him off the record in the presence of counsel for the Union, Respondent, and the General Counsel. Brown filed a charge that resulted in a complaint allegation that his discharge for alleged misconduct was unlawful. Brown's case will be submitted to arbitration, but he objects because he will not be permitted to testify in person before the arbitrator. His arbitration is one of a number that will be submitted on documentary evidence. He fell into this category of arbitration because the General Counsel uncovered alleged misconduct, after further investigation, from which he concluded he could not sustain Brown's reinstatement, should the case be litigated. In these circumstances, and because the facts of the alleged misconduct were admitted, an arbitration limited to documentary submissions, the last of which is reserved for Brown, is not unreasonable.

in reaching the settlement. And, according to the General Counsel, Respondent's history of prior violations and its previous compliance with settlement agreements provides no basis for rejection of this settlement. The General Counsel also states that Respondent has demonstrated its intention to comply with the settlement and the requirements of the Act.

I now turn to factor 2 of *Independent Stave*, which asks whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation. Consideration of this factor too warrants acceptance of the partial settlement.

As I have indicated, even if the General Counsel succeeded in winning all aspects of the national case before me, there would be a lengthy appellate process with an uncertain result. It would be years before employees obtained reinstatement and backpay. The outlook for conclusion of the local case is even bleaker since that case, estimated to consume several years, has not even been tried. The issues involved are quite complex and a favorable outcome for either side is not guaranteed. In all the circumstances, I think that the risks inherent in this litigation and the time necessary to resolve all issues justify this partial settlement. Not only are backpay and recall issues subtantially resolved, but the employees will be operating under a collective-bargaining agreement in an atmosphere of cooperation that contrasts sharply with what was taking place just 3 or 4 years ago.

To the extent that the parties were unable to resolve EBS, that issue is to be decided by the Board. One aspect of the partial settlement does impact EBS and it deserves some comment. Although the partial settlement does not limit the Board's normal remedy in deciding EBS, it does limit the amount of backpay available to recompense employees who will have suffered from its effects should it be found unlawful. Any EBS recovery must come from the Bankruptcy Court trust assets allocated to the General Counsel's claim. Respondent will not pay anything more. The Union and the General Counsel agree to this limitation. As far as I am aware, this type of prelitigation compliance agreement is unprecedented. For this reason, I was unwilling to rule separately on the settlement before deciding the EBS issue itself. Thus, my recommendation on whether to approve the settlement will go to the Board along with my recommended decision on EBS. It is ultimately the Board's call whether to approve what is in effect a prelitigation compliance determination affecting an issue which is not settled with the remainder of the case.

I nevertheless believe that, in the unique circumstances of this case, the partial settlement should be approved. Even assuming the General Counsel succeeds in ultimately proving EBS is unlawful, the limitation on EBS backpay must be considered in the context of the overall partial settlement which owes much of its provenance to the bankruptcy proceeding. The partial settlement that resolves many issues in a complex litigation is not worth rejecting on this issue alone. In any event, the General Counsel is unable to determine exactly how much backpay would be attributable to the EBS violations. He has not done the necessarily complicated investigation and calculations which would be entailed. The settlement itself gives him discretion in allocating the trust fund assets to provide backpay to employees for both the settled matters and EBS. Thus, the amount of any EBS recovery is unclear; indeed, there is no reason to believe that it would in itself be greater than the value of the trust fund assets. Moreover, the restriction on EBS backpay must be viewed in light of the Respondent's financial situation. The same considerations that I mentioned generally about the possibility of recovering something more than the moneys in the bankruptcy trust some time down the line, after a backpay amount is liquidated, apply to EBS. Even if, after all the appeals are concluded, Respondent were to lose on the EBS issue, and a backpay figure were set that was higher than the assets in trust, a very speculative matter at this stage of the proceedings, the Respondent could still argue that its liability was restricted to the moneys in the trust. Respondent's view is not clearly untenable on this point. Finally, Respondent has recently emerged from bankruptcy and still faces an uncertain financial future. The joint brief of the Union and the Respondent in support of the partial settlement states as follows (Br. 4):

> [A]s a practical matter, the securities in the Trust represent all the value that is available for backpay. At the time of the Settlement, Greyhound had operated for only one summer season since it had emerged from bankruptcy in the fall of 1991; the parties recognized that the Company did not have any resources to dedicate to backpay except for those securities in the Trust. This economic reality has not changed in the year since the Settlement was first reached.

I cannot say in these circumstances that restricting EBS backpay only to the proceeds of the bankruptcy trust assets is unreasonable or so inconsistent with Board policies as to compel rejection of the partial settlement or this aspect of it.

C. *Background Evidence and Findings*

The partial settlement resolves complaint allegations that Respondent violated Section 8(a)(5), (3), and (1) of the Act by insisting upon ADL, an unlawful bargaining provision that improperly limited striker seniority and reinstatement rights and discriminated against strikers, as a price for any overall agreement, and by implementing such provision on March 2, 1990. The settlement also resolves the issue of whether the parties reached a valid impasse as of March 2. The settlement further resolves the issue of whether Respondent violated the bargaining requirements of the Act by failing and refusing to provide the Union with necessary and relevant information upon request. I, however, heard considerable evidence on these issues and the parties fully briefed them prior to the settlement. This evidence is not only part of the record herein, but of the bargaining history in this case. The parties have recognized the propriety of considering this evidence, even though much of it is addressed to settled matters, in determining the EBS issues yet to be decided. The memorandum of understanding provides that I and any reviewing authority may consider the ''entire record including evidence relating to resolved allegations of the Complaint and all defenses thereto, and may make any such subsidiary factual findings as necessary to resolve EBS.'' This is but a reflection of the principle that presettlement conduct may be utilized as background in determining postsettlement issues subject to resolution by the Board. See *Northern California District Council (Joseph's Landscaping Service)*, 154 NLRB 1384 (1965); *Electrical Workers IBEW Local 613*, 227

NLRB 1954 (1977); *Steves Sash & Door Co.*, 164 NLRB 468, 476 (1967), enfd. in pertinent part 401 F.2d 676, 678 (5th Cir. 1968); *Lawyers Publishing Co.*, 273 NLRB 129, 130 fn. 4 (1984).

To fully understand and explicate the EBS issues I am called upon to decide, and to place them in the appropriate context, it is necessary to consider the parties' prior contractual relationship and bargaining, the implementation of ADL 3 days before the proposal of EBS, and how it operated, as well as Respondent's communications to employees immediately before and during the strike and its failure to supply information as to job vacancies.

1. Respondent's bidding system

Under the existing contract, and for many years, seniority governed job assignments, bidding, furlough or layoff, and recall, as well as transfer rights, for all employees, but particularly drivers or operators. Respondent's drivers are based at approximately 100 locations within its 4 regional companies throughout the country. Their jobs are identified either as ''regular runs,'' that is, a run between particular cities at designated times and days, or ''extra board assignments,'' that is, runs or jobs not as steady as the regular run positions or those involving unanticipated work ''as the necessity of the service require[d].'' Respondent's business is cyclical so there is an increased need for drivers in the summertime and a decreased need in the winter. Indeed, the work ebbed and flowed so much, according to one of Respondent's witnesses, that drivers ''shuffl[ed] around all the time.'' About half of the drivers operate a regular run and about half operate from the extra board.

Operators are permitted to bid regular runs and extra board assignments by seniority within their regional company. They are permitted at least four general bids annually. The contract states that ''[a]n operator not obtaining a regular run shall sign up on the extra board.'' The extra board works as follows:

> Each operator at the top of the extra board will receive the first assignment and such additional assignments from time to time during the day as will give him as close to ten (10) hours of driving for the day as possible. That operator will then rotate to the bottom of the board. . . . If there are more extra board operators than the Company needs at a location, the Company may, between general bids, assign the most junior operators to work at another location within the same Regional Company.

Bidding by seniority is also applicable to the creation of a ''new run'' or a ''permanent vacancy,'' which is defined as any run ''open for thirty-one (31) days or more,'' except for vacations or charters, which were to be handled as ''holddowns.'' The latter, holddowns, are defined as regular runs open for 30 days or less and generally cover situations where the incumbent is on vacation or sick leave. Holddowns are assigned through the extra board, but, when the run is open for 4 days or more, it is subject to the bidding procedure. Bidding is also applicable to material changes in regular runs, defined as differences in location, times, or earnings. Since the contract provides pay based on mileage, those runs or assignments with greater mileage are more attractive.

This bidding procedure, particularly when applied to regular runs and during general bids, results in what Respondent describes as a ''domino'' effect of bidding and rebidding. The open position was filled, thereby opening another position and so forth. This is a chaotic and time-consuming process. The selection of runs, however, is crucial to drivers, not only because it affects earnings, but also because it permits drivers to choose particular runs for their convenience, desirability, location, or times of work. Generally, the more senior drivers select regular runs and the more junior drivers operate from the extra board. For example, furloughed drivers are basically operators with insufficient seniority to hold any driving jobs; and drivers recalled from furlough generally went on the extra board because of their low seniority. The contract itself states that a driver not operating a regular run must sign up on the extra board. Testimony in this case establishes that it takes a number of years of seniority for a driver to win and hold a regular run, which is generally more stable and predictable than work on the extra board. Accordingly, I find that, except in unusual circumstances, regular runs were preferred.

2. The implementation of ADL

Respondent's initial contract proposal, submitted on November 2, 1989, contained ADL additions to several provisions of the existing agreement, most particularly those governing seniority. Although ADL applied to all employees, it had a greater impact on drivers because they utilized seniority to a greater extent. In addition to its application in bidding for regular runs and some extra board work, seniority was important with respect to new runs, permanent vacancies, and material changes. Of course, all employees, but particularly drivers, were concerned with seniority as it affected furlough, transfer, and recall rights, all of which were impacted by ADL. Respondent defined ADL by inserting the following language in article B-1 of the contract's seniority provisions:

> Only active duty employees may use their seniority to bid on assignments. An active duty employee is one who is either working regularly or on leave of absence under Article B-6 [no loss of seniority for mutually agreed leaves of 30 days or more], vacation under Article D-5, or sick leave under Article D-6. Employees not on active duty may use their seniority to return to duty but only to fill vacancies in the work force.

No one disputes that strikers were not ''active duty'' employees. Indeed, only strikers were not ''active duty'' employees. Respondent concedes that ADL applied and was meant to apply only in the event of a strike.

In bargaining, Respondent insisted, contrary to the Union, on the inclusion of ADL in any contract reached by the parties. On March 2, 1990, Respondent implemented ADL, and applied it thereafter. As shown below and as described by Respondent's own witnesses, ADL denied initial use of seniority to returning strikers. It also effectively relegated them to the least desirable jobs upon reinstatement and denied them other more desirable vacancies, including positions they had occupied before the strike.

In describing the effect of ADL, Lannie testified that an unreinstated striker, who had unconditionally offered to re-

turn to work, could not bid on or obtain a position rendered vacant by the discharge or voluntary quit of the incumbent replacement in that position. Instead, that position would be bid upon only by the existing work force made up of replacements and crossovers. Moreover, whatever opening remained after this initial bid was also bid upon only by the existing work force. After all the bidding was completed, the striker was placed in the resulting vacancy whereby he would ''plug the board,'' that is, the extra board. Lannie defines such a vacancy—indeed any vacancy under AD—as a ''run that no one [meaning existing replacements or cross-overs] fills.'' The returning striker thus must not only wait for an existing vacant position to be bid, and the consequent domino effect of further bidding, but he always returns only to the extra board and he takes a job that no one else wants.

Indeed, under ADL, the striker may not return to his old position, the very one he occupied before the strike, if it is vacated by the replacement who had been holding it. Lannie specifically testified about a situation where a striker held a desirable Phoenix to Albuquerque regular run before the strike and the replacement who held it during the strike was fired or quit. According to Lannie, the striker could not return to that position even though it was vacant and no existing replacements or crossovers would be displaced by putting the striker back into his old job. The striker would have to await the completion of the domino-type bidding process and take the last remaining job, on the extra board. Only after completing his first assignment on the extra board could the striker bid on future openings, when and if they arose, using his seniority. In short, strikers could not return to a regular run even if it was vacant; they could only return to the extra board.

Lannie's testimony on the operation of ADL, as set forth above, was essentially confirmed by Tancos, as well as a local area general manager, Carol Martins. Southern Greyhound President Dan Frieden also testified that the above-described procedure was ''how it ended up as [sic] being handled.''

Respondent prominently advertised its intent to implement ADL in at least two contemporaneous communications to employees, one on February 22 and another on March 1, 1990, the last day of bargaining before implementation of ADL. In the February 22 communication, Respondent stated, ''we hope you will decide to stay at work and not risk giving your job to someone else.'' In the March 1 communication, after asking a hypothetical question about a driver with 15 years' seniority who unconditionally offers to return to work when none is available and no additional jobs ever open, Respondent stated that the driver ''never regains a job at GLI.'' These were not isolated statements. Their substance was repeated after the implementation of ADL, and after the proposal and implementation of EBS, in a March 6 directive to managers and in a May 4 letter to all employees.[9]

[9] In negotiations Lannie told the Union that ADL was basically a codification of the Supreme Court's decision in the TWA case, *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426 (1989). This was a misreading of *TWA.* In that case, the Supreme Court considered the imposition of a reinstatement procedure at the conclusion of a strike which was found to be an economic strike. The union sought the displacement of junior crossovers, not existing replacements or senior crossovers, in order to make room for more senior full term strikers. The Court, reversing the court of appeals, held that an employer need not displace or lay off junior crossovers in order to reinstate more senior full term strikers at the conclusion of an economic strike. Although technically the case involved the Railway Labor Act rather than the National Labor Relations Act, the result was in accordance with longstanding Board policy, as the Board pointed out to the Court in an amicus brief supporting the employer's position that was adopted by the Court. In contrast to the procedure upheld by *TWA,* Respondent's ADL precludes reinstatement to a vacant regular run position, including the striker's own former job, *even though no existing employee is displaced.*

3. Failure to provide information as to vacancies

In a May 29 letter to Respondent, the Union's attorney, Martin Burns, specifically asked for information concerning ''the number of positions which are presently available.'' This request was repeated in a June 26 letter from Burns to Tancos, in which he commented on Tancos' response to his earlier letter. Burns' June 26 letter reads, in pertinent part, as follows:

> In your June 4 letter you advised that you would be ''happy to advise of the number of openings'' if the Council's position is that fewer than all strikers will accept an offer of reinstatement ''under current working conditions.'' As explained above, all unfair labor practice strikers are entitled to reinstatement, but we are not adverse to have fewer than all strikers return to work. Moreover, regardless of the wages and conditions Greyhound intends to provide any such returnees, and regardless of whether any members accept your offer, we renew our request for the information detailed in my May 29 letter. As the collective bargaining representative of all bargaining unit employees, both striking and nonstriking, we need the data requested for at least two purposes: in order to determine the changes, if any, which should be made in our negotiating position; and to evaluate intelligently how our members would be affected if individual offers of reinstatement were made by Greyhound or if the striker were to be terminated, i.e., how many could expect immediate reinstatement and where the positions are available.

In a July 10 letter, which was not received by the Union until over a month later, Tancos responded to Burns' June 26 letter. He said that ''any returning striker would come under the terms and conditions implemented by the Company'' and that strikers should contact supervisors at ''the location last worked and if there are vacancies they will be returned to work.'' Tancos, however, stated only that ''the number of vacancies are limited.'' On the witness stand, Tancos conceded that he never provided the Union with information concerning the number of vacancies available either at each location or within Respondent's four regional companies. Such vacancies obviously existed because Respondent continued to hire numerous employees throughout 1990 and early 1991.

Respondent did not provide the Union with requested information concerning the number of vacancies available to returning strikers immediately after the May 22, 1990 unconditional offer to return to work. Nor did it provide such information at any time in the next several months when it was continuing to hire new employees. Respondent's failure to

supply this information extended through a period when the Union was trying to negotiate over the return of strikers to vacant positions, as well as EBS, and when Respondent was implementing ADL and EBS while advertising for and hiring experienced replacements who could and did qualify for EBS.

D. *The EBS Allegations*

I turn now to an analysis of the complaint allegations involving the legality of EBS. The General Counsel alleges basically that Respondent's proposal and implementation of EBS violated Section 8(a)(5), (3), and (1) of the Act. The General Counsel asserts that EBS was an unlawful bargaining provision under three separate and alternative theories: EBS was inherently destructive of important statutory rights and therefore unlawful without regard to any reasons advanced for it; even if it was less intrusive on employee rights, it was not justified by legitimate and substantial business reasons; and, finally, EBS was motivated by discriminatory reasons. I agree with the General Counsel's position on all three theories.

My analysis of EBS will include a detailed review of the relevant circumstances surrounding the proposal, its implementation and impact, followed by a legal analysis of the three theories of violation advanced by the General Counsel.

1. The facts

On March 5, Lannie sent Strait a telefax letter that amended Respondent's recently implemented January 10 proposal by adding to article B-1 of that proposal an EBS provision. The new provision, whose subject matter was never discussed or alluded to in prior bargaining sessions, stated that ''[t]he seniority of full-time operators'' would be measured by years of service with Respondent ''plus any prior years of service as a Department of Transportation qualified over-the-road tractor-trailer operator, over-the-road charter bus operator, or intercity bus operator.'' The letter asked for an ''immediate response'' and stated that, if Respondent did not hear from the Union by March 8—3 days later, it would conclude that the Union accepted the EBS proposal.

Despite the March 8 deadline set forth in Lannie's letter fax to the Union, it appears that Respondent had already decided to implement EBS. In an internal memorandum dated March 5—the same date as Lannie's letter fax, Respondent's vice president of marketing, Ralph J. Borland, notified the four Greyhound regional presidents that full-page print insertions were planned for Sunday, March 10, to announce the EBS program in connection with newspaper advertisements for replacement drivers. Borland asked for lists of jobs available and names of cities ''you want the ads to run in.'' Actually, another internal memo and other documentary evidence establish that some of these ads began running on March 8. In some cities, the ads offered a $2000 signup bonus ''for qualified, experienced drivers.'' The ads stated that EBS would be used for ''full bidding and pay seniority.''

On March 5, the same day he received Lannie's letter, Strait responded, demanding an immediate retraction of the proposal which, he said, the Union considered an unfair labor practice. Strait complained that the matter was not properly presented to the Union or discussed with it ''to the point of impasse.'' He concluded by asking Respondent to notify employees that EBS would not be recognized ''pending further face-to-face negotiations between the Company and the Greyhound Council.'' This response was received by Respondent on March 6. Another formal request to bargain, made by the Union on March 8, was rebuffed by the Respondent.

On March 9, in a special edition of its Greyhound Lines newsletter distributed to all employees, the Respondent announced that it had implemented EBS and had authorized ads including EBS in offers for replacement drivers. Respondent stated its view that Respondent and the Union had reached impasse on EBS on March 6, identifying this date as the date of implementation. In the newsletter, Respondent said that replacements hired before March 6 would receive EBS, as would strikers and crossovers, and that it expected most replacements hired under EBS would have fewer than 10 years of EBS credit. Respondent also explained why it had implemented EBS. It said that implementation of EBS was ''an economic necessity because of the heavy expense of training new hires who have no prior driving experience.''

In subsequent bargaining sessions and in a March 13 letter in advance of the March 17 session, Respondent expressed adherence to its position on EBS and insisted that it would not roll back the now-implemented EBS program. The Union continued to oppose implementation of EBS. Indeed, on March 30, the Union filed an unfair labor practice charge over the matter.

In a March 29, 1990 memo to all employees, Respondent stated that its driver training program—which had continued after the commencement of the strike—had been ''executed well'' and that it expected to ''meet our commitment of 2,400 drivers by April 2nd.'' The memo continued: ''Experienced drivers are no longer the limiting factor in restoring service; we have the ability to add drivers at the rate of 350–400 per week.'' Another memo, distributed within Southern Greyhound the same day, announced that Respondent had decided temporarily to close its Jackson, Mississippi training academy because, ''by April 8, in excess of 1000 drivers will be in the Southern system'' and ''we simply cannot absorb any additional personnel.'' This memo also said that, ''by the end of April, if not sooner, Southern Greyhound would be ''running at almost full steam.'' Moreover, during the May 5 bargaining session, Lannie announced that Respondent had, at that point, attained a ''full complement'' of 3800 drivers. He said that there were ''620 jobs available,'' but that they would be filled by drivers in training, with none left for strikers.

Respondent continued to hire employees and to offer them EBS throughout 1990 and at least through mid-1991. Although the partial settlement provides that no EBS credit will be offered or available to operators hired after September 1, 1991, the record is unclear as to when Respondent stopped making EBS available to new hires. It is clear, however, that EBS credits are still being utilized by drivers today whenever seniority is applied.

The two focal points of EBS—experience and seniority—must be placed in context. Before the strike, according to Lannie's statement to Strait in an April 30, 1990 meeting, Respondent ''never tried to hire experienced people.'' Lannie confirmed the statement, which appeared in his affidavit, on

the witness stand.[10] In contrast, after the strike, indeed, even before the strike, in anticipation of it, Respondent sought to hire experienced drivers. Thus, Respondent called for the hiring of experienced replacements in anticipation of the strike, in February 1990. After March 2, it heightened its emphasis on hiring experienced drivers in both radio and newspaper ads. EBS and other inducements, including monetary bonuses, were offered as part of the advertising package.

Significantly, EBS provided drivers with additional seniority for all purposes. It was not limited to use during layoffs or recalls. The additional seniority applied in job bidding and affected earnings based on the type of job selected. It is not disputed that seniority is very important for drivers in Respondent's operation. Indeed, a considerable amount of seniority was needed for drivers to gain and hold a regular run, the most secure and lucrative job in the system. One driver testified that ''[s]eniority means everything in Greyhound, everything. My wages, my days off, whether I can actually work in a city where my wife and my family is. It means everything.'' A dispatcher testified that ''[o]ur runs, shifts, vacations and everything was based on seniority.'' Both Frieden and Lannie agreed that seniority was important. Respondent's advertising for replacements and its communications with strikers made clear that seniority was important in attracting replacements and in persuading strikers to cross the Union's picket line.

Respondent communicated an explanation of EBS to all strikers, together with pleas to abandon the strike. I have already mentioned the March 9 newsletter announcing implementation of EBS. On March 6, however, even before publication of the newsletter, Lannie had issued written instructions to field managers to distribute enclosed previously drafted notices—some specifically addressed to low seniority drivers—urging the strikers to return to work.[11] In a March 8 memorandum from Southern Greyhound President Dan Frieden to his subordinates, he included a script for supervisors to use in calls to be made ''to'' drivers; who should be alerted, according to Frieden, to the March 9 newsletter's discussion of ''seniority.'' In another March 8 memorandum, specifically entitled ''explanation'' of EBS, Frieden suggested that EBS be discussed with potential crossovers. They were to be told that, once positions were filled at a location, no more replacements or crossovers would be accepted. This point had been made in other communications to employees, including in the March 9 newsletter where Respondent included a plea that strikers return before jobs were filled at each location. These communications undoubtedly heightened the anxiety of strikers about the effect of granting EBS to replacements on their own seniority, particularly in view of other earlier communications that created the impression that the hiring of replacements was jeopardizing their continued employment. Indeed, the March 1 communication also announced a separate recall procedure, which was implemented during the period EBS was being promoted, that brought back strikers in the order in which they had offered to end their participation in the strike.

Frieden himself, as well as other supervisors and managers throughout Respondent's system, talked to strikers about the implementation of EBS. The clear implication of Respondent's direct written communications to employees, some targeting low seniority strikers, and the instructions to lower level managers and supervisors, discussed above, as well as the thrust of testimony about subsequent oral communications between managers and supervisors and striking employees, was that strikers should return to work, in part because of the effect on them of EBS. This evidence supports the finding, which I make, that strikers were told, in effect, that, by returning to work immediately, they could avoid the hiring of replacements whose EBS credits might adversely affect their relative seniority.[12]

I find, based on the above evidence and findings, that Respondent used EBS to induce strikers to return to work. This inducement was based on Respondent's belief that at least some strikers would have their relative seniority affected by the grant of EBS to replacements. Frieden himself admitted that EBS ''was an improvement to bring [the replacements] on board.'' That EBS was understood to have a potential adverse effect on the relative seniority of strikers is also illustrated in the cross-examination of a number of employee witnesses, former strikers, by counsel for Respondent. These former strikers were repeatedly asked whether they knew or understood that, upon their return to work, some of the replacements who received EBS would have more seniority than they themselves would. The strikers repeatedly said that this was indeed their understanding.

Respondent also directed that union resignation forms be distributed to strikers. On March 7, Tancos sent a memorandum to regional company presidents asking that an enclosed union resignation form, presumably prepared by Respondent, be made available to strikers and given the ''broadest pos-

[10] In other parts of his testimony, particularly before he was presented with his affidavit containing the statement to Strait, Lannie waffled about the practice of hiring experienced drivers before the strike. I find Lannie's statement in his affidavit, which he confirmed on the witness stand, much more reliable than his vague, rambling testimony that might suggest otherwise. Other testimony from other witnesses about Respondent's prestrike hiring practices is conflicting, and no documentary evidence was submitted on the point. Thus, I am unable to agree with the General Counsel's contention that Respondent had an explicit policy of not hiring experienced personnel before the strike. I am, however, confident in making the finding, in accordance with Lannie's affidavit and testimony concerning what he told Strait, that Respondent did not try to hire experienced drivers before the strike or before it anticipated the strike.

[11] One notice was specifically addressed to former Trailways drivers because, as Respondent stated in the notice, the Union wanted to limit their seniority to July 14, 1987, the date of Respondent's takeover of Trailways. Respondent's implementation of terms had resulted in an improvement in Trailways seniority. Another notice was specifically addressed to ''all 1987, 1988, and 1989 seniority drivers.'' Lannie testified that, between 1987 and March 1990, Respondent had hired about 2000 drivers.

[12] Numerous employee witnesses testified about conversations with managers and supervisors about EBS, their own seniority, and abandonment of the strike; some managers and supervisors in turn were called upon to give their version of these conversations. In view of the written communications and instructions, as well as all of the testimony, some of which was uncontradicted, and the probabilities, I do not believe that managers and supervisors never initiated conversations with strikers about these matters and simply responded to questions. They did initiate at least some of these conversations. But, in the last analysis it does not matter who raised EBS or abandonment of the strike in individual conversations. The subjects were essentially raised by Respondent in its written communications to employees.

sible distribution.'' Although the memorandum was cast in terms of a response to alleged requests by employees to abandon the Union to avoid fines, there is no record evidence of any such requests. In any event, Respondent directed that a copy of the signed resignation form be sent to its payroll department at a specified address in Dallas—a direction that obviously went beyond simply providing information to employees. In the next few weeks, some strikers were asked to sign the forms. On April 26, Respondent discontinued using the form, stating, in another memo from Tancos, ''[s]o there is no misunderstanding, an employee does not have to resign from Union membership to come back to work and we should not ask them whether or not they have resigned.'' The Respondent's initial memo was in effect for almost 2 months before its clarification. The clear implication of the second memo was that managers and supervisors had indeed used the resignation forms in accordance with the earlier memo's suggestion that they be broadly distributed and that their intervention had contributed to an acknowledged ''misunderstanding'' that a striker had to resign union membership to return to work.

Except for the above communications to employees about EBS and related matters, unreinstated strikers were not notified about the details of applying for EBS and they were not offered the opportunity to apply for EBS until they had actually returned to work. Under ADL, they could not exercise their seniority until after they returned to the extra board and another job became available or a general bid was scheduled. In contrast, at various times at different locations in the next few weeks and months, active duty employees, that is, replacements and crossovers, were notified of the details of EBS, told how they could apply for it, and even given help in acquiring verification of their prior qualifying experience. This notification came in the form of a specific document either posted at the terminals or otherwise distributed to active duty employees. In St. Louis, the Respondent also made forms available to active duty employees for use when applying for EBS.

Absent EBS, all strikers would have carried greater seniority than all replacements because the latter would have carried, at the earliest, a March 2, 1990 seniority date. After EBS, however, employees were affected differently because their additional seniority, if they qualified for it, was based on the previous driving experience of each individual driver. Even considering that, under Respondent's program, some strikers might obtain EBS after they returned to work, it is clear, from the program itself and from the communications of Respondent to strikers, that some replacements would, by virtue of EBS credits, still have greater seniority than some returning strikers. For example, a replacement with 30 years of EBS presently outranks any striker whose combined EBS and Greyhound seniority is 29 years or less. This is not a hypothetical because Respondent's own documentary evidence shows that, as of April 1991, 6 replacements carried over 30 years of EBS credit and about 10 times that number carried over 20 years of EBS credit.

Several exhibits were received in evidence that show the relative seniority of replacements and former strikers who returned to work (crossovers). All show the obvious: some replacements, by virtue of EBS, outrank some former strikers, whether their seniority was earned solely through Greyhound or augmented by some EBS credits. One such exhibit, submitted by Respondent, lists some 3400 active duty drivers as of April 16, 1991. About 750 are former strikers; the rest are replacements. I have made an independent analysis of the exhibit, focusing particularly on former strikers with more than 10 years of seniority because the record in this case shows that, in some locations, it takes about that much seniority to hold a regular run. The exhibit shows some 230 former strikers who have, by virtue of Greyhound seniority alone, or with EBS added, between 10 and 20 years of seniority. Their seniority dates run from January 1970 through December 1980. All are outranked by 59 replacements whose seniority came only from EBS. Focusing on two individual drivers yields a telling disparity. Driver No. 080040 from New York City, whose seniority date is June 23, 1980, and whose seniority comes exclusively from Greyhound with no EBS, stands below over 300 replacements. Driver No. 081465 from Knoxville, Tennessee, whose seniority date is July 13, 1970, and whose seniority is likewise devoid of EBS credits, stands below over 60 replacements. Consideration of another exhibit—the February 6, 1992 roster of St. Louis drivers—yields the same result. The number 3 driver on the list is a replacement who, by virtue of EBS, carries a seniority date of October 1, 1966. He outranks three former strikers who carry Greyhound seniority from 1969 and 1970. Then comes a replacement whose EBS credits permit him to outrank a former striker who carries seniority from 1973 and many other former strikers, some who received EBS and some who did not.

Since Respondent does not compute the possible EBS of unreinstated strikers, it has no documents reflecting their relative seniority as against the replacements or the crossovers. Since they are not given the detailed information on how to apply, it is not possible to construct a document reflecting the EBS, if any, of unreinstated strikers. Based on the submitted documents, however, it is fairly inferable that some of them will likewise suffer as against some of the replacements. Indeed, it is unlikely that more than a small percentage of them will obtain EBS after they return to work. I have checked the General Counsel's analysis of Respondent's April 1991 seniority list and found that it is substantially correct. That analysis reveals that about 15 percent of the reinstated former strikers and about 40 percent (actually 39 percent) of the replacements received EBS. I have also verified the General Counsel's analysis of the list that reveals that replacements accumulated more total EBS credit than former strikers. For example, of the top 100 drivers in terms of EBS credit granted, only 5 were former strikers.[13]

[13] R. Exh. 831 lists some 3400 active duty drivers as of April 1991, their dates of hire and their seniority dates. From this information it is possible to determine how many replacements and how many crossovers received EBS and how many did not. Drivers hired after March 2, 1990, are, of course, replacements. Drivers hired before are crossovers. Those whose hire date is July 14, 1987, are former Trailways drivers since that is the date of Respondent's acquisition of Trailways; under the Respondent's implemented March 2 proposal, Trailways drivers received additional seniority even apart from EBS. Where the seniority date is earlier than the hire date, the driver has earned and qualified for EBS. The document also permits a determination of how much EBS has been credited to the driver. In an attachment to his reply brief, the General Counsel has set forth a summary and analysis of the Respondent's exhibit, which I have verified, except for minor discrepancies that do not affect the general conclusions of the summary.

Whatever can be said about the unreinstated strikers who had not received EBS, the documentary evidence that yields the relative seniority of replacements and crossovers as of April 1991—1 year after the strike—illustrates that, in practice, EBS had the same impact as could be easily foreseen when the program was proposed. It diminished the relative seniority of strikers because of the strike and provided some replacements with greater overall seniority than some strikers.

2. EBS is an unlawful superseniority program

When an employer or union insists, as a condition of overall agreement, on aquiescence by the other party in an unlawful term or condition of employment, it violates its statutory duty to bargain in good faith. Hardin, *The Developing Labor Law* (3d ed. 1992), Chapter 16, pp. 948–950 and 952 and cases there cited. Unlawful contractual conditions or provisions are defined as ones that, ''by their terms or in their effectuation, are repugnant to the Act's specific language or basic policy.'' *National Maritime Union (Texas Co.)*, 78 NLRB 971, 981–982 (1948). See also *Massillon Community Hospital*, 282 NLRB 675, 676 (1987); *Interstate Paper Supply Co*., 251 NLRB 1423 (1980). An employer's insistence upon and implementation of a bargaining provision that adversely impacts the right to strike and bargain collectively constitutes a violation of Section 8(a)(5), (3), and (1) of the Act. See *Erie Resistor Corp*., 132 NLRB 621, 630–631 (1961), enfd. sub nom. *Electrical Workers UE Local 613 v. NLRB*, 328 F.2d 723 (3d Cir. 1964), after intervening Supreme Court decision at 373 U.S. 221 (1963); *Philip Carey Mfg. Co. v. NLRB*, 331 F.2d 720 (6th Cir. 1964), cert. denied 379 U.S. 888 (1964).

In *National Football League*, 309 NLRB 78 (1992), the Board summarized the applicable principles with respect to conduct that adversely impacts employee rights, especially the right to strike. Some conduct is so inherently destructive of union or employee interests and so devoid of significant economic justification that the Board may find an unfair labor practice without regard to proof of unlawful intent even if the employer introduces evidence that it was motivated by business considerations. This is because the conduct carries its own indicia of intent and adverse foreseeable consequences. Moreover, even where the impact on employee rights is comparatively slight, no proof of intent is required to sustain a violation where the employer has failed to meet its burden of showing ''legitimate and substantial business justifications'' for its conduct. Only if the employer has met its burden in this respect need the General Counsel come forward and prove that the employer was actually motivated by antiunion considerations. Id. at 80–81 fn. 15, and cases there cited.

Respondent admittedly insisted upon EBS to impasse and therefore made it a condition of agreement. The question then becomes whether EBS was lawful. I find that EBS is an unlawful bargaining provision. It amounts to the grant of strike-related superseniority that seriously impacts the right to strike and severely hampers a future bargaining relationship. More particularly, I find that EBS is inherently destructive of employee rights. I also find that Respondent has not established that its proposal and implementation of EBS was justified by legitimate and substantial business reasons and that the General Counsel has proved that EBS was proposed and implemented for discriminatory reasons. Accordingly, I find that Respondent's insistence upon and implementation of EBS violated the Act.[14]

a. *EBS is inherently destructive of important statutory rights*

The lead case on inherently destructive conduct is one that also deals with superseniority. In *NLRB v. Erie Resistor*, 373 U.S. 221 (1963), the Supreme Court upheld the Board's determination that the insistence upon and implementation of a provision that would grant 20 years of additional seniority both to striker replacements and crossovers, limited only for use during future layoffs, was violative of Section 8(a)(5), (3), and (1) of the Act. This provision was deemed unlawful without regard to the employer's asserted business justification or its actual motive because it was ''inherently destructive'' of the right to strike and the employer was held to have intended its foreseeable consequences. Id. at 227–229, 236–237. The Board and the Court assumed that the employer needed superseniority to ''keep production going'' and ''to attract replacements and induce union members to leave the strike.'' Id. at 231. But they nevertheless concluded that these reasons, even if true, did not counterbalance the discriminatory and destructive characteristics of the superseniority clause.

In *Erie Resistor*, the employer's argument in support of superseniority was based on an asserted equivalence with the right to hire permanent replacements under *NLRB v. Mackay Radio & Telegraph Co*., 304 U.S. 333 (1938). The Board specifically rejected this argument by describing why superseniority was qualitatively different from the right to use permanent replacements which, according to the Board, would be unduly ''enlarged'' if the employer's position were sustained. 132 NLRB at 626–629. The Court agreed, approving the Board's reasoning that superseniority affected the tenure of all strikers and necessarily operated to their detriment; induced them to abandon the strike and return to work because it was also made available to strikers; lasted indefinitely and permanently; crippled the strike because at one stroke gave those with low seniority the job security only long service brings and diluted the accumulated seniority of older employees; and rendered future bargaining difficult because of the lasting cleavage between employees long after the strike has ended. 373 U.S. at 230–231.

Although not as clear cut as the superseniority in *Erie Resistor*, EBS is a superseniority system more similar to than different from that in *Erie Resistor*. It has the same discriminatory impact and destructive characteristics, and, in some ways, it is broader and more pernicious. Moreover, the same reasons against enlarging the definition of permanent replacements under *Mackay* apply here as in *Erie Resistor*. Here, as in *Erie Resistor*, EBS was proposed and implemented because of the strike, assertedly in order to attract needed re-

[14] In its brief (Br. 139), Respondent contends that the Union waived its right to bargain over EBS. The contention is without merit. Unlike in the situation where a party is advancing a lawful bargaining provision, the waiver defense is unavailable where, as here, the party asserting the waiver is advancing an unlawful provision. This is because the other party need not negotiate at all over the unlawful provision. See *Louisiana Dock Co. v. NLRB*, 909 F.2d 281, 288 (7th Cir. 1990).

placements. Absent the strike there would have been no EBS. Like the superseniority in *Erie Resistor*, EBS diminishes the relative seniority of strikers. In the absence of EBS, the replacements would carry seniority dates which would, at the earliest, be the date of the commencement of the strike, and all strikers, with perhaps minor exceptions, would carry greater seniority at the end of the strike than all replacements. After EBS this seniority is diminished to the extent that replacements are awarded EBS. Some strikers would—and indeed do—have less seniority than some replacements. An analysis of the documentary evidence with respect to the actual impact of EBS, together with Respondent's changed emphasis in recruiting experienced drivers in connection with the strike, confirms the preference granted replacements. Finally, as in *Erie Resistor*, a striker may not obtain EBS until he has first returned to work and applied for it. Unreinstated strikers are not even given the same information as ''active duty'' drivers with respect to the details of EBS or how to apply for it. Thus, the disparities thought significant in the superseniority system in *Erie Resistor* apply as well to EBS.

EBS also interferes to the same extent with the bargaining process and the right to strike as did the superseniority system in *Erie Resistor*. Turning to the specific characteristics discussed in *Erie Resistor*, I find that, on the whole, EBS has the same flaws. As mentioned above, EBS affects the relative seniority of strikers; some wind up with less seniority than some replacements. Moreover, the availability of EBS to strikers tends to induce them to abandon the strike. Here, there was actual evidence of the Respondent's use of EBS for this purpose. Thus, EBS deals a crippling blow to the strike. Some replacements, who would have no accumulated seniority under ordinary circumstances, receive a windfall which permits them to dilute the relative seniority of some strikers and even to outrank some strikers, including some whose total seniority came from working exclusively for Greyhound. The documentary evidence confirms the disparity of EBS as against strikers. In this case, Respondent went out of its way to advertise for experienced replacements, something it had not tried to do when hiring under normal circumstances. This made it reasonably foreseeable that the impact of EBS would fall more heavily in favor of replacements. Finally, EBS is permanent, and future bargaining is rendered much more difficult because of the cleavage between those who received extra seniority and those who did not. Employees will know that it was the strike that caused the cleavage, and, indeed, the bargaining problems that, in this case, prevented the resolution of the EBS issue, despite the settlement and eventual bargaining agreement of the parties. The disparity that results from EBS is particularly significant here because so much of the employment relationship is based on seniority.[15]

In some respects EBS is more destructive of employee rights than the superseniority system in *Erie Resistor*. First of all, EBS is not limited to seniority for future layoffs, as was the case in *Erie Resistor*; it applies to all aspects of the employment relationship, including choice of runs and bidding for jobs when vacancies arise or during a general bid. This affects earning power every day, especially in this particular employment relationship where seniority is so important. Thus, EBS has no relationship at all to protecting the permanency of replacements under *Mackay* that was at the core of the asserted justification in *Erie Resistor*. And it is broader than is necessary to attract and retain replacements. See *Great Lakes Carbon Corp. v. NLRB*, 360 F.2d 19, 21 (4th Cir. 1966). Secondly, EBS was implemented in the context of ADL, which itself limited striker seniority and reinstatement. Strikers were not only faced with replacements who had gained EBS without having worked for Respondent, but they could not use their own seniority, at least initially, to fill vacancies, even those in their old jobs. They could only be reinstated to the extra board and had to wait to exercise their seniority until another vacancy arose or a general bid took place. Nor were they provided with the help given to ''active duty'' employees in processing applications for experienced-based seniority. No such context appears in *Erie Resistor*. Finally, EBS effectively destroys the principle of seniority that is so crucial in the employment relationship and the collective-bargaining relationship of the parties. With EBS distortions abound. For example, unlike the situation in *Erie Resistor*, where a crossover could gain the same superseniority credit that was gained by the replacements, here, a low seniority crossover with no previous driving experience may be outranked by a replacement whose only seniority is acquired through EBS credits. Full-term strikers encounter similar problems. The Union is charged with representing both strikers and replacements, as well as both those who receive EBS and those who do not, without having had a say in negotiating EBS. Untangling EBS through collective bargaining is thus an almost insurmountable burden, especially in light of the Union's requirement to fairly represent all employees in the bargaining unit under *Vaca v. Sipes*, 386 U.S. 171 (1977), and the independent right of replacements to sue under *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983).[16]

The only arguably significant difference between the superseniority in *Erie Resistor* and that in this case is that, even after the strike is over, full-term strikers may apply for and obtain EBS, if they qualify for it, upon their return to

[15] Contrary to Respondent's contention, the discrimination that triggers an inquiry into whether conduct is inherently destructive of employee rights is not limited simply to distinctions between strikers and nonstrikers. The operative discrimination includes the difference between conduct that takes place because of a strike and conduct that would not have taken place in the absence of a strike. See *NLRB v. Jemco, Inc.*, 465 F.2d 1148, 1152 (6th Cir. 1972), cert. denied 409 U.S. 1109 (1973); *Allied Industrial Workers v. NLRB*, 476 F.2d 868, 877 (D.C. Cir. 1973). This is the situation here; but, in addition, here, there is a distinction between some strikers and some replacements to the detriment of some strikers. In any event, even if conduct does not divide the work force based on participation in a protected activity, it may be proscribed under *Erie Resistor* where, as here, it discourages collective bargaining by making it appear to be a futile exercise. See *NLRB v. Centra, Inc.*, 954 F.2d 366, 373 (6th Cir. 1992).

[16] This case and *Erie Resistor* are similar in one other respect. In both cases the need for the extra seniority was cast in terms of a need to continue operating during a strike, to attract replacements and to induce striking employees to return to work. Actually, Respondent's contemporary explanation was more limited, mentioning only the high cost of training new drivers. These reasons—indeed any reasons advanced—for the type of interference with the right to strike that this case and *Erie Resistor* present are not sufficient as a matter of law to justify the inherently destructive conduct of either superseniority program.

work. In *Erie Resistor*, only crossovers received superseniority. This difference is not sufficient to legitimize EBS. Indeed, as shown above, the purported difference results in Respondent's crossovers taking a bigger hit than the crossovers in *Erie Resistor*. Moreover, although full-term strikers may apply for EBS upon their return to work, only some will obtain it; indeed, under ADL, they may not use it or any of their seniority when they are first reinstated to the extra board. Finally, the statistical evidence demonstrates that there is a disparity in the grant of EBS between replacements and crossover strikers. It is likely that this disparity will also obtain for the full-term strikers, some of whom will obviously suffer a relative loss of seniority as opposed to some replacements. Respondent's failure to notify the unreinstated strikers of the details in applying for EBS and to give them the same opportunity as crossovers and replacements to apply for EBS also contrasts sharply with its prominent communications to them about abandoning the strike because replacements might be hired with an opportunity, through EBS, to outrank them in seniority.

This separate treatment of unreinstated strikers, together with the limitation on seniority and reinstatement under ADL, makes the inchoate right to EBS a tenuous one at best. In these circumstances, the theoretical grant of EBS to some full-term strikers does not remove the disparity in the system that still exists and that, when considered with the same impediment to the bargaining process, carries the same flaws as those denounced in *Erie Resistor*. Accordingly, I find that the difference between EBS and the superseniority system in *Erie Resistor* does not outweigh the similarities and the other factors that make EBS even more harmful than the superseniority system in *Erie Resistor*. Nor does this difference have any relationship to the right under *Mackay* to use permanent replacements. Like the situation in *Erie Resistor*, the offer of EBS is ''more accurately an offer of benefit to individual strikers to abandon the strike and return to work,'' which would ordinarily constitute an independent violation of the Act, and it ''greatly enlarges the definition of 'replacement' as envisioned by *Mackay*.'' 132 NLRB at 627.

In sum, I find that EBS has the same significant inherently destructive characteristics as the superseniority found unlawful in *Erie Resistor*. EBS was thus an unlawful bargaining provision that could not be insisted upon as a condition of agreement or implemented.

b. *EBS was not justified by legitimate and substantial business reasons*

Even assuming, contrary to my view, that the above analysis is found insufficient to establish that EBS carries the same inherently destructive characteristics as the superseniority in *Erie Resistor*, it certainly is sufficient to support the alternative finding, which I also make, that EBS has some impact on the right to strike and to bargain collectively. Accordingly, the Respondent would be required to show that EBS was justified by a legitimate and substantial business reason. I find that Respondent has not made such a showing in this case. See *National Football League*, supra, 309 NLRB at 81–84.

The only contemporary explanation of EBS appears in Respondent's March 9 newsletter where Respondent said that EBS ''was an economic necessity because of the heavy expense of training new hires who have no prior driving experience.'' At the hearing, the only witness who testified to any significant degree about the reason for promulgating EBS was Lannie, who said that the program was decided upon during a meeting attended by him, Schmeider and Currey on the morning of March 5. Southern Greyhound President Dan Frieden also testified, briefly, that the idea for EBS was discussed during a ''brainstorming'' telephone conference call that included him, the three other regional presidents, and Lannie, Schmeider, and Currey on March 4 or 5.

Although Lannie testified generally that EBS was intended to increase the driver complement and to attract replacements, this conclusory explanation alone is insufficient to establish a substantial and legitimate business reason for EBS. Lannie went further, however, and gave other explanations for EBS, different from the reason offered in the March 9 newsletter. Lannie's main explanation was delivered in his testimony that, between March 2 and 5, he received reports of picket line violence that led him to believe that inexperienced replacements were not dealing with the violence as well as experienced replacements. Lannie's testimony, however, was unsupported by the documentary evidence he allegedly relied on. Although incident reports on violence were fed to Lannie through subordinates and he undoubtedly considered them in order to make decisions on discipline or discharge of individual strikers and on injunction requests to state courts and the Labor Board, none of this evidence supports the distinction Lannie attempts to make in his testimony. Neither the incident reports nor the injunction papers submitted in connection with Lannie's testimony show anything that would permit a finding, or even a suggestion, that inexperienced replacements had any more difficulties in the first few days of the strike than experienced replacements.[17]

Nor is Lannie's testimony supported by other testimony or evidence. For example, neither violence nor the alleged success of experienced drivers handling violence was mentioned in Respondent's March 9 newsletter explaining the implementation of EBS. Neither was mentioned as a reason for EBS in Lannie's March 5 letter fax to the Union or in any subsequent bargaining session. And Lannie's testimony was not supported by Frieden who said that EBS was hatched in a ''brainstorming'' conference call that included Lannie. Frieden mentioned a discussion of ''difficulty'' in obtaining drivers, but he said nothing about a particular need for experienced drivers or violence playing a role in the brainstorming process. In these circumstances, I cannot accept Lannie's testimony concerning the role of alleged violence and the performance of experienced replacements as a factor in the utilization of EBS.

To the extent that other portions of Lannie's testimony may be viewed as asserting a specific need for experienced

[17] I note the hearsay nature of the incident reports which I nevertheless received in evidence solely to assess Lannie's motivation in proposing and implementing EBS. Respondent also submitted as exhibits some 22 temporary restraining orders and preliminary injunctions requested by Respondent and issued by state and local courts, again in connection with Lannie's testimony. Some of these were entered during the 3-day span when Lannie was considering EBS, others shortly thereafter. I reserved ruling on these exhibits (R. Exh. 433(a)–(v)) at the hearing. I will admit the exhibits in evidence for the sole and limited purpose of assessing Lannie's testimony on this issue.

replacement drivers, I find that this testimony is likewise unpersuasive. Lannie did not know how many experienced drivers reported for work during the period he was considering EBS, how many drivers reported once and never reported again, or how many drivers Respondent was ''losing.'' He did not know how many replacements had previous driving experience. He did not know whether the driver complement was increasing or decreasing. And he did not even know how many replacements were working during the period he was considering EBS. Lannie's entire testimony in this respect was so vague and conclusory as to render completely unreliable any of his explanations for EBS.[18]

Moreover, the pertinent documentary evidence does not support Lannie's testimony. It demonstrates, as shown below, that the need for experienced replacements was not thought to be acute. Indeed, it demonstrates that EBS was not even tied to the need for experienced replacements because EBS was offered to new hires well after Respondent conceded it no longer had a need for experienced drivers.

Respondent's strike contingency plan for Eastern Greyhound assumed continued operation at 25 percent of normal service at the initial stage of the strike, with additional service to commence on April 1. An internal Southern Greyhound memorandum, dated March 2, 1990, stated that ''because of a new hire driver inventory surplus, all recruiting scheduled for the next week is cancelled.'' A March 2 memo from top management to all employees indicated that over ''700 permanent replacements'' were at work. In its March 9 newsletter, Respondent set forth figures supporting a headline that read, ''Business Increases Steadily During First Week of Strike.'' The underlying figures showed that, on the first day of the strike, Respondent carried 27 percent of the passengers it carried the year before, and that, by the fifth day, March 6, it carried 37 percent. Again according to the newsletter, the employee count on March 7 included 1200 drivers, of whom ''almost 1000'' were replacements. A March 10 letter from Currey to a director of Respondent's holding company indicated that average busloads for the first 8 days of the strike were above those of the year before, and that Respondent had a ''favorable ratio of buses departing (34 percent) versus sales dollars (41 percent)'' in the first 8 days of the strike. By March 29, according to a memo from top management to employees, ''experienced drivers'' were ''no longer a limiting factor in restoring service'' and Respondent expected to ''meet our commitment of 2,400 drivers by April 2nd.'' Yet Respondent continued to hire drivers and to offer them EBS.

Lannie also testified, albeit briefly and again in conclusory fashion, that another reason for EBS was that mentioned in the March 9 newsletter, the high cost of training inexperienced drivers. As was the case with respect to Lannie's other testimony, Respondent submitted no relevant documentary evidence supporting this reason for its action. Assuming that it costs an employer more to train inexperienced people than to train experienced people, this means only that Respondent was justified in hiring experienced drivers. The alleged concern about training costs, however, does not establish a need to offer EBS to get those experienced drivers. Moreover, the alleged concern about training costs rings hollow. Assuming such a concern existed, the training cost differential between experienced and inexperienced drivers obviously predated the strike. But Respondent never raised any concern about this cost differential before. Nor did it focus on saving training money when it trained potential replacements in anticipation of the strike. Its belated concern in this respect is also suspect in view of Respondent's contemporaneous offer of substantial monetary incentives and bonuses to drivers in connection with its recruitment of replacements. On the contrary, it is fair to infer from this record that money was no object when it came to hiring replacements. Because the alleged high cost of training had nothing to do with the grant of EBS, and because there must be some nexus between Respondent's explanation and the grant of EBS, I find that this explanation fails as a legitimate and substantial business reason.

The above failure points out the deficiency in all of Lannie's explanations for EBS. None of them provides a justification, reason, or need for EBS, as opposed to a need generally for replacements or experienced replacements. Thus, Respondent is missing a crucial link in the chain of causation between Lannie's testimony and the need for EBS. Instead, Lannie attempted to justify EBS by repeating the need for experienced drivers as if this were a mantra. There was, for example, no evidence to show how or why DOT-approved driving experience related to driving a passenger bus or how or why seniority credit for that experience was needed. Nor was there any showing that Respondent could not obtain replacements, even experienced replacements, without EBS. Significantly, Respondent hired and trained replacements in anticipation of the strike without offering them EBS. These replacements received EBS after they were hired and already working. Respondent's attempt to equate the need for EBS with the need for experienced replacements thus fails to withstand scrutiny.

Nor has Respondent shown why it needed the expansive program it implemented. EBS not only provides protection from layoff, an arguable, although impermissible, extension of *Mackay*, but it grants permanent advantages to replacements in future job selection and assignment for no apparent reason, except for the diminution of similar advantages gained through years of employment by the prestrike work force. Moreover, Respondent continued to offer EBS to new hires well after the need to attract experienced drivers had abated, according to Respondent's own assessment of the situation. This shows that EBS was not carefully crafted to serve a legitimate and substantial business need, but rather was crafted, implemented, and continues to serve ends that were foreseeable: interference with the right to strike and to bargain collectively.

In sum, Respondent's explanation for EBS falls far short of a showing of a legitimate and substantial business justification. It certainly does not outweigh the serious impediment to employee rights caused by the grant of EBS. Thus, EBS is unlawful for this additional reason. See *NLRB v. Duncan Foundry & Machine Works*, 435 F.2d 612, 618–619 (7th Cir. 1970).

[18] I also found Lannie's testimony generally unreliable in this case. I have alluded to several examples of his unreliability elsewhere in this decision. One other prominent example was his unpersuasive testimony about Respondent's bargaining position on subcontracting, which conflicted with a position statement submitted to the General Counsel, during the investigation of this case, by Carl Taylor, Respondent's then labor attorney.

c. *EBS was a discriminatorily motivated program*

EBS is unlawful under a third rationale. I find that the General Counsel has proved that EBS was conceived and implemented for discriminatory reasons and that the Respondent has not shown that it would have imposed EBS for lawful reasons absent the strike.

Affirmative evidence of antiunion animus surrounding the proposal and implementation of EBS supports the General Counsel's contention that EBS was actually motivated by a desire to discourage union and strike activity. Respondent injected EBS into the negotiations 3 days into the strike as an entirely new issue. It presented the Union with a virtual fait accompli, with a short deadline and no face-to-face meetings before implementation. EBS was proposed and implemented because of the strike. It diminished the relative seniority of all strikers from what would have obtained in the absence of a strike, and, as the statistical evidence confirms, gave some replacements significant advantages over some strikers. Moreover, because Respondent concentrated on recruiting experienced replacements, something it had not emphasized in hiring drivers in a nonstrike context, significantly more replacements than strikers qualified for EBS. This disparity was exacerbated because EBS was superimposed on another program—ADL—that also specifically focused on strikers and restricted striker seniority and reinstatement. Respondent also showed antagonism toward strikers and the Union in repeated and widespread communications with employees, some suggesting job losses for striking. Respondent also used EBS to encourage employees to abandon the strike, and, at the same time, directed the broad distribution of union resignation forms it had prepared and wanted returned to it. Respondent further showed its disdain for the Union by denying it requested information concerning the number of vacancies available for returning strikers. At the same time, it was hiring replacements, who were eligible for EBS credits. Moreover, EBS was offered to new hires long after, according to Respondent's own evidence, any continued need to attract experienced employees had dissolved. This evidence of animus is so strong and so related to EBS as to sustain a finding of unlawful causation for EBS.

Respondent's overall motive toward the Union and the strikers is illustrated most dramatically by a written document that was generated for or as a result of a 3-day meeting in December 1990 of Respondent's top officials in Dallas. Copies of that document were thereafter distributed to local managers and supervisors. The document reviewed the strike, its challenges, and opportunities. Among the opportunities listed were ''the elimination of the ATU [the Union], the contract and its restrictions.'' Also mentioned in the document was the fact that the replacements were ''pro management and anti union.''[19]

[19] This document was introduced and received in evidence through the General Counsel's first witness in this case, New York Regional Manager of Drivers Joe Huguley. He attended the Dallas meeting and distributed the documents to a group of his subordinates. The Respondent did not submit any evidence to controvert the authenticity or substance of the document. I find that the document bears on Respondent's motivation for EBS and its other actions taken before and immediately after the strike, particularly when it is considered along with other evidence of animus in this record.

Further support for the finding of discriminatory motivation is found in the weakness of Respondent's explanations of EBS discussed above. Those explanations, offered through the testimony of Lannie, fail to withstand analysis and amount to a pretext. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). The failure of an employer's reasons for an asserted unlawful act to withstand scrutiny in this respect constitutes affirmative evidence of discrimination. See *Weco Cleaning Specialists*, 308 NLRB 310 at fn. 4 (1992).[20]

3. Summary as to EBS

In summary, I find that EBS was an unlawful bargaining provision because it is inherently destructive of employee rights, because, even if comparatively less intrusive of employee rights, it was not justified by legitimate and substantial business reasons, and because its promulgation and implementation was discriminatorily motivated. Accordingly, I find that Respondent's insistence upon and implementation of EBS was violative of Section 8(a)(5), (3), and (1) of the Act.

E. *Respondent's Defenses Based on Alleged Violations by the Union*

Respondent alleges that it was justified in engaging in conduct that would otherwise violate the Act because the Union itself committed bargaining violations by insisting upon permissive subjects of bargaining, that is, improved retiree benefits and settlement of a pending grievance, and by overall bad-faith bargaining. I find this allegation to be completely without merit. Even assuming that proof of the Union's alleged bargaining offenses, which are not the subject of complaint allegations, could excuse Respondent's violations in this case as a matter of law, Respondent has not proved that the Union engaged in violations of the Act.

Unlike the unlawful subject pressed by Respondent as the price for any agreement (see discussion of legal principles applicable to EBS supra), permissive subjects, such as retiree benefits, may be bargained about, agreed upon and included in a collective-bargaining agreement. A party may advance a proposal on a permissive subject, even repeatedly, so long as it does not insist upon it as a price for an overall agreement. See *NLRB v. Borg-Warner Corp*., 356 U.S. 342, 349 (1958); *Reichhold v. NLRB*, 953 F.2d 594 fn. 2 (D.C. Cir. 1992). A charge that a union failed to bargain in good faith requires proof that it did not approach the bargaining table with the same willingness to reach accommodation and agreement that is required of an employer. In neither case does the Board require concessions or withdrawal of lawful proposals fairly advanced. See *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 488 (1960), and *Hostar Marine Transport Systems*, 298 NLRB 188, 195 (1990).

The Union did not unlawfully insist upon the resolution of a pending grievance involving the discharge of Harold Mendlowitz as a price for reaching any overall agreement

[20] Of course, when an employer is found to have advanced a pretextual reason for alleged unlawful conduct, it has failed to meet its burden to overcome a prima facie case of discrimination under *Wright Line*, 251 NLRB 1083 (1990). See *Aero Metal Forms*, 310 NLRB 397, 399 (1993); *Bardaville Electric*, 309 NLRB 337 at fn. 3 (1992).

with Respondent. The matter itself played an insignificant role in negotiations. It was mentioned in the first bargaining session by Strait. Lannie's testimony, however, that Strait ''insisted'' that Mendlowitz be reinstated before the Union was willing to begin bargaining is contradicted by Respondent's bargaining notes of that meeting, which were later adopted by Lannie. Those notes describe Strait's position as follows: ''wants Company to consider putting H. Mendlowitz back to work.'' The notes comport with the credible testimony of union negotiators on the matter. Respondent filed a charge over the Union's position on Mendlowitz, but almost immediately withdrew it, and both parties agreed that the matter would proceed to arbitration. Bargaining continued without further reference to Mendlowitz until February 16 when Burns cited Respondent's failure to ''cooperate'' in resolving the Mendlowitz matter as an example of Respondent's bad faith. Nothing in Burns' remarks could be viewed as amounting to an insistence upon resolution of the matter as a condition for an overall agreement. Lannie, however, thereafter attributed to Burns an accusation that Respondent's position on Mendlowitz ''impeded'' bargaining. In a February 24 letter to Lannie, Strait refuted the charge and he clearly and expressly disavowed any insistence upon the Mendlowitz matter. The issue was never raised again. I therefore reject the Respondent's position that the Union's isolated references to Mendlowitz amount to bad-faith bargaining.[21]

I reach the same conclusion with respect to the Union's position on increased retiree benefits. First, however, I must place this issue in context. The Union did not seek immediate and direct increased contributions from Respondent to finance retiree increases. It simply asked that the separate pension trust fund, which had been in existence for many years, even before the present owners of Respondent took over the operation, and which was supervised by both management and union trustees, use its surplus, in part, to finance retiree increases. Apparently, Respondent's agreement in negotiations was a prerequisite for trust fund allocations to finance retiree increases. The Union wanted a specific increase of 3 percent in each year of the labor agreement, payable out of the ''Pension Reserves.'' In its March 1 offer, Respondent proposed a counteroffer: If, after a study, an excess surplus was deemed to exist in the fund, Respondent would accede to an unspecified increase in retiree benefits so long as there would be no need for increased contributions from Respondent. On March 17, the Union reduced its proposal for increased benefits from 3 percent to 2 percent.

The evidence does not support findings that the Union's position on increased retiree benefits was intransigent, insisted upon as a price for overall agreement or to impasse, or that it was instrumental in preventing overall agreement. The Union simply asked that Respondent agree with its position that some increase be considered for retirees; it did not insist upon its position as a condition for a contract. This is shown conclusively by two exhibits: First, Lannie's own notes of the February 16 meeting of the parties which have the Union's attorney, Burns, stating, in response to statements from his counterpart, Carl Taylor, that he knew the law on this issue and that the Union was not insisting upon improved retiree benefits. Second, Strait's February 24 letter to Lannie responded to an accusation similar to that made with respect to the Mendowitz matter with a similar clear and express disavowal that the Union was insisting upon increased retiree benefits. Nothing that occurred thereafter shows a change in the Union's position that it was asking for rather than insisting upon increased retiree benefits. Indeed, improved retiree benefits was simply one of many issues that the Union wanted resolved. Thus, I reject any contention that the Union's position on this issue was violative of the Act.

I also reject Respondent's contention that the Union engaged in overall bad-faith or surface bargaining within the meaning of the Act. A fair reading of the bargaining in this case demonstrates that the Union was trying to reach an agreement. The evidence shows that the Union was willing to, and actually did, compromise its positions repeatedly on a wide range of issues; it pressed for further bargaining, in the face of Respondent's early and repeated assertions of impasse; and it suggested the intervention of a Federal mediator, which Respondent, at first, resisted. Even after it struck the Union continued to press for negotiations. There is no substance to the Respondent's charge that the Union bargained in bad faith.

Even apart from my finding that Respondent's allegations of bad-faith bargaining on the part of the Union, whether considered individually or in total, are without merit, Respondent's position on EBS had nothing to do with the Union's alleged bad-faith bargaining. Thus, those allegations could not provide a defense to Respondent's unlawful proposal and implementation of EBS. On the last day of the settlement hearing, Respondent repeated its intention to rely upon certain affirmative defenses which I struck from the case in my decision and order of December 30, 1991. Basically, those defenses alleged bad-faith bargaining by the Union by virtue of its alleged campaign of violence and alleged status as a competitor of Respondent. Since I rejected these defenses as a matter of law, they cannot form the basis of a defense to EBS. I doubt moreover whether the alleged

[21] I reject Respondent's contention that Strait's February 24 letter to Lannie was not delivered to him at a subsequent bargaining session. Strait testified that he did deliver it, and Lannie, asserting that the letter was a ''fake,'' testified Strait did not. No one else testified about the matter. I credit Strait, based, in part, upon my assessment of the reliability and demeanor of each witness, and also the probabilities that the letter was delivered, in view of the content and context of the letter in the negotiation process. First of all, the letter clearly responded to a February 23 letter from Lannie which was not responded to elsewhere. The parties did meet on February 26; and it was not uncommon for one side to hand-deliver letters to the other at bargaining meetings. Lannie's February 23 letter accused the Union of proposing a mediator as a ''public relations ploy,'' opined that the Union's strike was ''inevitable,'' and criticized the Union for raising the Mendlowitz and retiree benefits matters in a recent meeting. Strait's letter responded, quite specifically, to each of these statements, as well as others in the Lannie letter, and also to Currey's February 22 communication threatening implementation of terms at the expiration of the existing contract, to which he had also not yet directly responded. Strait's response is consistent with the Union's position expressed elsewhere, and the letter itself is so directly responsive and contemporary that I cannot view it as anything but authentic. Second, Lannie seemed to be exaggerating and posturing to support a litigation theory. He went out of his way to call the letter a ''fake'' and volunteered legalistic reasons why this was so, reasons which I find unpersuasive. Strait, on the other hand, played it straight and displayed a guileless candor on the witness stand.

violence defense can or should appropriately be considered in view of the partial settlement, which in effect rules out a full litigation of that issue. In any event, however, nothing in Lannie's testimony suggests that EBS was formulated or implemented because of the Union's alleged bad-faith bargaining as set forth in Respondent's stricken affirmative defenses. Finally, since none of Respondent's allegations concerning unlawful bargaining by the Union have any merit, there is likewise no merit to its contention that the Union's strike was unlawful or unprotected. To the extent that the foregoing discussion deals with Respondent's stricken affirmative defenses, I am adopting and reaffirming the relevant portions of my December 30, 1991 decision and order, which is in evidence herein as the Administrative Law Judge's Exhibit 3.

CONCLUSIONS OF LAW

1. By insisting upon EBS, an unlawful and discriminatory bargaining provision, as a price for an overall agreement, and by implementing EBS, Respondent violated Section 8(a)(5), (3), and (1) of the Act.

2. The above violations are unfair labor practices within the meaning of the Act.

3. The Respondent has not proved that the Union engaged in unfair labor practices that excused its own unfair labor practices.

4. The partial settlement of the parties in this case effectuates the purposes and policies of the Act and is in the public interest. The relevant complaint allegations covered by the settlement are dismissed, except those involving the discharge of certain named employees which are conditionally dismissed.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

Respondent shall be ordered to rescind its EBS program, restore employees to the seniority they would have had absent EBS credits, and eliminate all effects of EBS. Respondent will also be ordered to make employees whole for any loss of pay or benefits they may have suffered by reason of Respondent's unlawful implementation and maintenance of EBS. Backpay, with interest, shall be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[22]

ORDER

The national and local cases, previously severed by order of December 30, 1991, approved by order of the Board dated March 12, 1992, are unsevered and reconsolidated. The EBS allegations in the complaint are severed for separate determination. The Vermont Transit allegations, Cases 30–CA–10681–3, –4, –5, –6, –7, –9 (formerly, 1–CA–27121; 1–CA–27147; 1–CA–27169–1, –2; 1–CA–27518), are severed for further consideration.

The Respondent, Greyhound Lines, Inc., Dallas, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating against employees because they engage in a strike or other protected concerted activity by implementing or maintaining experience-based seniority (EBS) or any other terms and conditions of employment that discriminate against employees because they strike or engage in protected concerted activity.

(b) Refusing and failing to bargain in good faith with the Union by insisting upon EBS or other unlawful bargaining provisions as a price for an overall agreement.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, meet and bargain in good faith with the Union concerning wages and other terms and conditions of employment of the employees in the appropriate unit.

(b) Rescind all terms and conditions of the unlawfully implemented EBS program, restore all employees to the seniority that would have obtained absent EBS, and eliminate all effects of EBS by all appropriate means, including, where necessary, the restoration of employees to runs to which they would be entitled absent EBS.

(c) Make unit employees whole for any loss of wages, compensation or benefits, with interest, they may have suffered as a result of its unlawfully implemented EBS program, in accordance with the remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post copies of the attached notice marked ''Appendix''[23] on its bulletin boards or designated places where notices to employees are customarily posted at all of its locations throughout the United States. The notice shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS ALSO RECOMMENDED that the partial settlement of the parties in this case be approved and that the relevant complaint allegations covered by the settlement be dismissed, except for those involving the discharge of employees John Bledsoe, Theodore Brannon, Edwin Cole, Bill Cousins, Rudolph Hardman, Michael Holden, Andy Malkinson, Saul

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

Neville, Curtis Rogers, Riley Smith, and Robert Tuttle, which are conditionally dismissed, provided that, as to those allegations:

> Jurisdiction is retained for the limited purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Order, either been resolved by settlement or promptly submitted to arbitration, or (b) the arbitration proceeding has not been fair and regular or has reached a result that is repugnant to the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discriminate against employees because they engage in a strike or other protected concerted activity by implementing or maintaining experience-based seniority (EBS) or any other terms and conditions of employment that discriminate against employees because they strike or engage in protected concerted activity.

WE WILL NOT refuse and fail to bargain in good faith with the Union by insisting upon EBS or any other unlawful bargaining provision as a price for an overall agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL bargain in good faith with the Union concerning wages and other terms of employment of the employees in the appropriate unit.

WE WILL rescind the unlawfully implemented EBS program, restore all employees to the seniority that would have obtained absent EBS, eliminate all effects of EBS by all appropriate means, including, where necessary, the restoration of employees to the runs to which they would be entitled absent EBS and make employees whole for any loss of wages, compensation or benefits they may have suffered as a result of the implementation and maintenance of EBS, with interest.

GREYHOUND LINES, INC.